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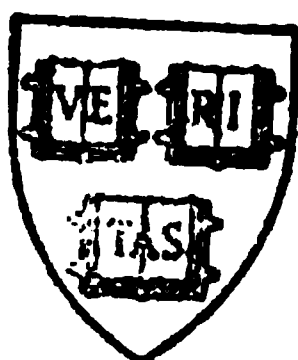
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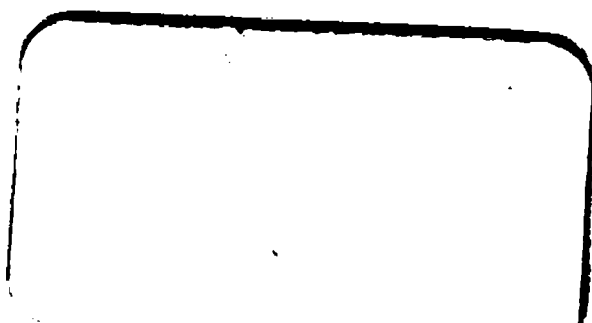
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REPORTS OF CASES

DECIDED IN THE

1216
APPELLATE COURTS

OF THE

STATE OF ILLINOIS.

VOLUME XXI.

CONTAINING CASES IN WHICH OPINIONS WERE FILED IN THE SECOND DISTRICT
IN JUNE AND DECEMBER, 1886; IN THE THIRD DISTRICT IN FEBRUARY,
MAY, AUGUST, NOVEMBER AND DECEMBER, 1886; AND IN
THE FOURTH DISTRICT IN NOVEMBER, 1886, AND
IN JANUARY AND MARCH, 1887.

REPORTED BY
EDWIN BURRITT SMITH,
OF THE CHICAGO BAR.

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OFFICERS OF THE
APPELLATE COURTS OF ILLINOIS

DURING THE TIME OF THESE REPORTS.

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THOMAS A. MORAN, *Judge*, Chicago.
JOSEPH M. BAILEY, *Judge*, Freeport.
JOHN J. HEALY, *Clerk*, Chicago.

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GEORGE W. WALL, *Judge*, Du Quoin.
CHAUNCEY S. CONGER, *Judge*, Carmi.
GEORGE W. JONES, *Clerk*, Springfield.

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JACOB W. WILKIN, *Presiding Judge*, Danville.
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N. W. GREEN, *Judge*, Tazewell.
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7. The seventh part of the document is a list of the names and addresses of the members of the committee who have been elected to the office of the collector. The names are listed in alphabetical order, and the addresses are given in full, including the street, city, and state.

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CASES
IN THE
APPELLATE COURTS OF ILLINOIS.

THIRD DISTRICT—NOVEMBER TERM, 1885.

THE PEOPLE EX REL. JOHN S. LYMAN
V.
THE OHIO AND MISSISSIPPI RAILROAD COMPANY.

Railroad Fences—Objects of—Construction of Sec. 3, Act of March 31, 1874—Location to be on Line of Right of Way.

1. The words, "on both sides of its road," as used in Sec. 3, Act of March 31, 1874, relating to fencing railroads, mean the margin or border of the entire grounds used as a roadway.

2. Where an adjoining owner has notified a railroad company, under said section, to fence its track, it can not construct a fence within its right of way and prevent him from connecting his fences with the fence so constructed, the incidental benefit arising to land owners being within the intention of the act, although its main object is the protection of the traveling public.

3. In the construction of a statute its language should be given, when the sense will bear it, its usual and popular meaning.

[Opinion filed February 26, 1886.]

IN ERROR to the Circuit Court of Sangamon County; the
Hon. JAMES A. CREIGHTON, Judge, presiding.

Statement of the case, by CONGER, J. The plaintiff in error
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assigns as error the judgment of the Circuit Court in sustaining the demurrer to his petition and dismissing the same. The petition sets forth in substance that the O. & M. Railroad Company some years since constructed their railroad through relator's farm, leaving part on each side of the right of way; that he never waived nor compromised with the railroad its duty to construct fences along its sides where they pass through his farm; that they had been operating their road through his farm several years, but had not built the fences required by law along the sides of their right of way; that relator had given the thirty days notice required by the statute, requesting the railway company to construct a fence on the south side of its road where the same ran through his farm; that the company had neglected and refused to do this, but had required of relator that he help pay for the fence, and refusing to do so threatened to construct the fence which he had notified them to build on the side of their road ten feet inside their right of way, and would then forbid his crossing their ten feet of right of way, thus thrown out to connect his fences with theirs; that he refused to comply, and thereupon the company had built a fence ten feet inside their right of way, and had then cut away and removed its hedge and fence at the ends of petitioner's said tract of land, where said road enters and goes out of the same, and between said fence which it had so erected and petitioner's land, thereby exposing petitioner's said land to the trespassing of stock from the highway at one end and the egress of petitioner's stock upon said highway, and also exposing petitioner's stock to said company's track at the other end of said fence, and then forbade petitioner from inclosing his said land upon said new fence being erected by said company, and forbade relator entering upon their ten feet for the purpose of inclosing his fences upon theirs. The petition avers it is still the duty of the railway company to build and maintain a fence upon said line as required by the "act" and the notice.

These averments of the petition are all admitted by the demurrer filed by the railway company. The petition prays for a peremptory writ requiring the company to erect and main-

tain a fence upon said line as required by said law and notice. The question presented is, can a railroad company, after it has been notified by an adjoining owner, under Sec. 8 of the Act of the Illinois Legislature, entitled "An Act in relation to fencing and operating railroads," approved March 31, 1874, to construct a fence on the side of its road where the same passes through his farm, build the fence anywhere except on the line between its right of way and the adjoining owner's land?

Messrs. CONNELLY & MATHER, for plaintiff in error.

The meaning and intention of Sec. 1 of the Act of March 31, 1874, in relation to fencing and operating railroads, was construed by the Supreme Court in *W., St. L. & P. R. R. Co. v. Zeigler*, 108 Ill. 304.

The court in that case construed the phraseology requiring railroads to erect and maintain fences on both sides of their roads, to mean on the dividing line between the right of way and the farmer's land.

The question was raised under precisely the same sort of a notice given, and precisely the same provision of the statute as in this case.

In that case the Supreme Court held Zeigler could not recover the penalty of double the value of the fence because he had not built the fence on the line.

Had relator in this case built a fence under this notice and placed it where the company have, ten feet inside their right of way, then under this provision of the statute, and this same notice, he could not recover because not having complied with the statute.

Can the railway company comply with the same law and the same notice by building the fence ten feet within their right of way instead of on the side, which the Supreme Court holds to mean on the line?

Fences are for the use of the adjoining proprietor, for the purpose of fencing his stock in and other stock on the right of way out, as well as a police regulation for the benefit of the traveling public. *Chapin v. Sullivan R. R.*, 39 N. H. 53; *Eames v. S. & L. R. R. Co.*, 98 Mass. 560; *Enright v. S. F.*

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& S. J. R. R. Co., 33 Cal. 236; *Berry v. St. L. & L. R. R. Co.*, 65 Mo. 172.

It is competent legislation to require railroads to use their capital to fence the lands of adjoining owners. *Trice v. H. & St. J. R. R. Co.*, 49 Mo. 438.

Messrs. RAMSEY, MAXWELL & MATTHEWS, C. A. BEECHER, PERCY WERNER, and J. H. MATHENY, JR., for defendant in error.

Statutes requiring railroad companies to fence their roads, are upheld as regulations designed for the protection of the lives and property of the traveling public. *O. & M. R. R. Co. v. McClelland*, 25 Ill. 140; *G. & C. U. R. R. Co. v. Crawford*, 25 Ill. 529; *P., D. & E. R. R. Co. v. Duggan*, 109 Ill. 537; *C., B. & Q. R. R. Co. v. Hans*, 111 Ill. 114; *I. & C. R. R. Co. v. Parker*, 29 Ind. 471; *Blair v. M. & P. du C. R. R. Co.*, 20 Wis. 254; *Gilman v. E. & N. A. R. R. Co.*, 60 Me. 235.

The statutory obligation to fence, being a police regulation for the benefit of the general public, it is immaterial whether the owner of cattle injured in consequence of the failure to fence, be an adjoining proprietor or not, so far as the question of liability of the company for such injury is concerned. *I. & C. R. R. Co. v. McKinney*, 24 Ind. 283; *Gilman v. E. & N. A. R. R. Co.*, 60 Me. 235; *Rhodes v. U. I. & E. R. R. Co.*, 5 Hun, 344; *McCall v. Chamberlain*, 13 Wis. 637; *M. & C. R. R. Co. v. Stephenson*, 24 O. St. 48.

Therefore no peculiar protection or benefit to adjoining proprietors, as such, was intended.

The statute requiring railroad companies to fence their tracks is not for the purpose of protecting land owners from damage that might be done by stock getting on the right of way and thence to the adjacent crops. Its object was to prevent stock from coming on the railroad and being injured, and to prevent accidents likely to occur if stock were not fenced away from the track. *P., D. & E. R. R. Co. v. Schiller*, 12 Ill. App. 443.

CONGER, J. The question presented by this record is, whether a railroad company, under the circumstances stated in the petition, and the laws of Illinois, in reference to fencing railroads, may build the fence required, anywhere except on the line between its right of way and the adjoining owner's land.

The portion of the section involved is: "That every railroad corporation shall, within six months after any part of its line is open for use, erect and thereafter maintain fences on both sides of its road, or so much thereof as is open for use, suitable and sufficient to prevent cattle, horses, sheep, hogs or other stock from getting on such railroad (except at the crossing of public roads and highways and within the limits of cities and incorporated towns and villages) with gates or bars at the farm crossings of such railroad, which farm crossings shall be constructed by such corporation when and where the same may become necessary, for the use of the proprietors of the lands adjoining such railroad, etc."

What is the proper construction to be given the words "on both sides of its road," as used in the foregoing section? "In construing statutes we are required to give to language, when the sense will bear it, the usual and popular meaning attached to the words employed." *Stuart v. Hamilton*, 66 Ill. 255.

Webster defines "side," to mean "The margin, edge, verge or border of a surface: the bounding line of a geometrical figure, as the side of a field."

We hold the meaning of these words, "on both sides of its road," to be the margin or border of the entire ground used as a roadway. This gives certainty and completeness to all the sections in reference to fencing.

If railroads may construe this language to mean any imaginary line between the track and the margin of the right of way, why may not the adjoining land owner do the same for the other sections providing for the building of "such fence" by adjoining proprietors, clearly refer to the same fence spoken of in section one?

It is not to be supposed this law was meant to produce such absurd consequences, but that from the first to the fourth sections, inclusive, the same fence and the same place, were meant.

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In *W., St. L. & P. Ry. Co. v. Zeigler*, 108 Ill. 306, where the adjoining land owner intentionally built a fence two feet inside the company's right of way and sought to recover from the company, the court held he could not, and say: "To recover upon this penal liability of double the value of the fence, the statute should be strictly followed in the building of the fence. The fence should be such a one as the statute requires and authorizes, built in the mode the statute contemplates.

"Such a fence is one on the sides of the railroad. The fence in question was not built *on the side of the railroad*, but was intentionally built two feet inside the right of way, two feet *from the side of the road*. * * * To entitle to a recovery under this statute the fence must be built where the statute requires it should be, on the side of the railroad. It was not so built here."

It is urged by appellant that the benefit to the adjoining land owner of using the fence constructed by the railroad as a partition fence, was one of the objects to be accomplished by the law, while appellee insists that the only purpose intended was the protection of the traveling public, and the stock of the neighborhood through which the road passes.

The great and primary object of the statute was the increased safety to the traveling public, and the statute can be upheld only upon the ground of police regulations to more thoroughly secure such protection.

While the power of the Legislature to require railroad companies to make partition fences, as such, could not be sustained, we see no good reason why, in exercising its police power, by requiring railroad companies to protect the public by fencing their roads, the Legislature might not have had in contemplation also the incidental benefit arising to adjoining land owners by such fences being built upon the sides of the railroad, thereby enabling such adjoining land owners to join their fences to them and using them as partition fences.

It is also urged that in some cases there might be high embankments, deep cuts, or other physical conformation of the ground, making it difficult or impossible to comply with the law as we have construed it, and in such case a fence placed

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anywhere upon the right of way which would keep animals off the track, would be a compliance with the spirit and intention of the law. There is no such difficulty, however, presented by this record, and hence it is not necessary to express any opinion as to how far such a state of facts might excuse a railroad from a compliance with the literal language of the statute.

We think the Circuit Court erred in sustaining the demurrer and dismissing the petition, and the judgment below will be reversed, and the cause remanded for further proceedings in accordance with the foregoing views.

Reversed and remanded.

BLACKBURN UNIVERSITY

V.

HENRY H. WEER, FIRST NATIONAL BANK OF CARLINVILLE, MILTON MCCLURE AND C. H. C. ANDERSON.

Foreclosure of Mortgages—Limitation Act of 1872 not Retroactive—Construction—Bill to Foreclose—Assumption of Mortgage Debt—Principal and Agent—Limitation—Payment as New Promise—Parties.

1. Statutes of limitation are not given a retroactive effect, except upon a clear expression of the Legislative will.

2. The Act of 1872, limiting the time for the foreclosure of mortgages, does not apply to a mortgage previously given to secure the payment of a promissory note.

3. Upon a conveyance made in 1866, of certain lots in Carlinville, the deed reserved a lien to secure a note given for part of the purchase money. In each of several subsequent conveyances of said lots, the last made December 25, 1872, the lien was expressly retained, each grantee assuming and agreeing to pay the note. The interest was paid to the legal holder, a purchaser before maturity, by various of the grantees, the last grantee paying it from December 25, 1872, to January 26, 1883. Subsequently the last of said grantees conveyed the lots by mortgage and quitclaim deed. Upon a bill filed February 5, 1885, to enforce the lien securing said note, *held*: That the note held by complainant is the original note, a difference of date being a mistake; that the bill is not barred by the Act of 1872, limiting the time for the foreclosure of mortgages; that, in the absence of

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proof to the contrary, the payments of interest by the grantee of the maker, are to be taken, as against the holder of the note, as payments by the maker through him as his agent; that said payments arrested the running of the limitation of sixteen years against the note; that those holding under said last mortgage and said quitclaim deed, with notice of said first mortgage, are bound by said payments of interest as new promises which arrested the running of the statute against the mortgage debt; and that the right to file this bill was among the "rights or liabilities" saved by Sec. 24 of the Act of 1872.

[Opinion filed May 19, 1886.]

APPEAL from the Circuit Court of Macoupin county; the Hon. W. R. WELCH, Judge, presiding.

Messrs. S. S. GILBERT and PALMERS, ROBINSON & SHUTT, for appellant.

Part payment of a note is *prima facie* evidence of its execution. Walter v. Trustees of Schools, 12 Ill. 64; Melvin v. Hodges, 71 Ill. 424.

The cause of action accrued prior to July 1, 1872, and the rights of the parties are to be determined without reference to Sec. 11 of the Act of 1872. Beesley v. Spencer, 25 Ill. 216.

The existence of the mortgage debt is essential to the life of the mortgage. When the debt is paid, discharged, released, or barred by the Statute of Limitations, the mortgage is extinguished Emory v. Keighan, 88 Ill. 482; Pollock v. Maison, 41 Ill. 517.

The payment made by Rusher, within sixteen years, operates to defeat the bar of the statute. Carroll v. Forsyth, 69 Ill. 127; Lowery v. Gear, 32 Ill. 382.

A payment of interest or part of the principal renews the mortgage. 2 Jones on Mortgages, Sec. 1198.

Irrespective of the fact that the successive grantees were bound by the acceptance of their deeds to pay off the note, the mere part payment by them would keep the mortgage alive.

The note was given by Rusher to McConnell for \$1,000 purchase money; this controlling and decisive fact is not

denied by the answer of the defendants, and is proven by the deed of McConnell. All subsequent parties had notice of that fact.

Liens preserved in deeds like this, are in the nature of mortgages, and are not technical vendor's liens, as those terms are understood in courts of equity.

The lien in question is a lien by contract. The vendee's title is imperfect until the debt is paid. 1 Jones on Mortgages, Sec. 230.

It is not to be supposed that the Legislature intended to make ten years a peremptory bar to a proceeding to foreclose a mortgage, though the note which it was intended to secure was kept alive by payments, or a new promise.

Messrs. RINAKE & RINAKE, for appellees.

The bank and McClure never having assumed the payment of the debt secured by the Rusher mortgage, have the right to resist its enforcement against the lots in controversy. *Maher v. Lanfrom*, 86 Ill. 513; *Dunn v. Rogers*, 43 Ill. 260; *Fowler v. Fay*, 62 Ill. 375.

They may make every defense any innocent purchaser or incumbrancer might make.

More than sixteen years since the last payment made by Rusher had elapsed before this suit was brought, and all right to sue Rusher upon his note at law was barred under that statute, and the existence of the debt is essential to the life of the mortgage. When the debt is released or barred by the Statute of Limitations, the mortgage is extinguished. *Emory v. Keighan*, 88 Ill. 482.

The life of the note is not prolonged because of the consideration for which it was given.

When Hamilton assumed the payment of the debt secured by the mortgage from Rusher to McConnell, he thereby became the principal debtor, and Rusher the security. Jones on Mortgages, 741.

A payment by the principal debtor will not prevent the bar of the Statute of Limitations as against the security. *Knight v. Clements*, 45 Ala. 89.

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Nor will the payment by a joint maker have that effect. *Rush v. Stowell*, 71 Pa. St. 208; *Kallenbach v. Dickinson*, 100 Ill. 427.

The action at law on the note against Rusher is barred and the mortgage is extinguished. *Ilet v. Collins*, 103 Ill. 74.

This is not a suit on the note, and the old statute has no application to the case. This is an attempt to foreclose a mortgage. The suit is brought more than ten years after the right to foreclose the mortgage accrued.

It is competent for the Legislature to enact a Statute of Limitations operating on existing rights to action where there is a reasonable time allowed for bringing suits. *Koshkonong v. Burton*, 104 U. S. 668, 675, and cases cited.

PLEASANTS, J. On the 16th day of July, 1866, John T. McConnell and Camilla, his wife, by warranty deed of that date, in consideration of \$3,000, conveyed four lots in Carlinville, therein described, to Jackson Rusher, with the following provision: "And the party of the first part hereby retains a lien upon the said premises by way of mortgage to secure a certain note of this date for the sum of one thousand dollars, due on the 26th day of January, A. D. 1867, payable to said John T. McConnell with interest from date at the rate of eight per cent per annum until due, and after maturity to draw interest at the rate of ten per cent per annum, being given for a portion of the purchase money for the said premises."

Some short time afterward McConnell, for a valuable consideration, assigned to the Blackburn University a note, of which the following is a copy: "\$1,000. On or before the 26th day of January, A. D. 1867, for value received, I promise to pay to John T. McConnell, or order, the sum of one thousand dollars with interest from date at the rate of eight per cent per annum until due, and after maturity to draw interest at the rate of ten per cent. per annum. June 16, 1866. Jackson Rusher."

By his deed of February 20, 1868, Rusher conveyed said lots to John H. Caynor; September 7, 1868, Caynor reconveyed to

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Rusher; January 19, 1869, Rusher conveyed to Julius Hamilton, and he, on December 25, 1872, to appellee Weer.

In each of these deeds, after the one first above mentioned, the lien thereby declared was expressly retained, and payment of the note so secured, or intended to be, assumed by the grantee, and all, including the first, were duly recorded shortly after the execution of the same respectively.

Interest was paid each year on said note in the hands of appellant's treasurer—by Rusher to January 26, 1869; by Hamilton from that time to December 26, 1872, and by Weer thereafter to January 26, 1883.

On the 13th of March, 1883, Weer executed to the First National Bank of Carlinville a mortgage upon said lots, and on January 26, 1885, to Milton McClure, who was president of said bank and therein described as its "custodian," a quit-claim deed of the same.

No further payment being made upon said note the bill herein was filed February 5, 1885, by the University against said Weer, the Bank, McClure and Anderson, setting forth the facts above stated, averring that the note so assigned to complainant was the identical note referred to in the deed from McConnell to Rusher and was actually made by Rusher on the same day the deed was executed, though the month in the date was written "June" by mistake for "July;" that McClure, for the bank, has leased or claims to have leased the premises described to Weer for a year, and that Anderson is or claims to be a judgment creditor of said Weer; that the liens retained by the several deeds are all valid and subsisting and inured to the benefit of complainant for its security, and that its rights in the premises are prior and superior to those of the defendants; and praying that they may be so declared by a decree to that effect, that an account be taken of the amount due it, and the defendants, or some of them, required to pay the same by a time to be fixed, or in default thereof that the lots be sold and the equity of redemption foreclosed.

A demurrer to the bill interposed by the defendants having been overruled, the Bank and McClure filed a joint, and Weer a separate answer, alike in their material parts, which denied

that the note assigned to complainant was the one intended to be described in the McConnell deed, and set up the Statute of Limitations. Anderson was defaulted. Replications to the answers were put in, the cause referred to the master, proofs taken and reported, and on final hearing the bill was dismissed.

Inspection shows that the note in evidence corresponds exactly with the description in the McConnell deed in the following particulars: (1) The year of date; (2) the day of the month; (3) the payee; (4) the amount of principal; (5) the date of maturity; (6) the rate of interest until that date; (7) the new rate thereafter, and the statement in the deed that it was given for purchase money, affords ground for inference that it was made by the grantee therein named. It varies from the description only as to the month of the date, which is the one next preceding—a mistake of easy and frequent occurrence. That it was a mistake in this case is manifest from the amount of Rusher's first payment on February 9, 1867, which was \$42.22, being the exact amount of interest due at maturity from the 16th of July instead of June. The payment of interest upon it by each of the parties who assumed to pay it upon the one mentioned in the deed recognized it as the same, and we can not entertain the slightest doubt of its identity.

Of the existence, character and amount of this lien the Bank and McClure had constructive notice by the recorded deeds. They also had actual notice from Weer himself as he testifies, and McClure admits that the note was outstanding, unpaid, and in the hands of complainant by its treasurer. A recorded assignment of the lien by McConnell to complainant could have given them no fuller or clearer information. They therefore occupy no such position as was protected in *Ogle v. Turpin*, 102 Ill. 148, but stand in Weer's shoes and hold subject to complainant's claim unless it is barred by the Statute of Limitations, which is the only question in the case.

The provision relied on is Sec. 11 Ch. 83 of the R. S. 1874, which became a law on July 1, 1872, and declares that "No person shall commence an action or make a sale to foreclose

any mortgage or deed of trust in the nature of a mortgage, unless within ten years after the right of action or right to make such sale accrued."

The deed from Hamilton to Weer by which the latter assumed to pay this lien, was executed December 25, 1872, after the statute took effect. The note being then overdue, the right to foreclose as against Weer accrued immediately, and yet the bill herein was not filed until February 5, 1885, more than ten years thereafter.

Appellees therefore claim that the right to foreclose upon Weer's assumption was absolutely barred by the statute, and further, that Rusher, the original mortgagor, paid no interest on the note after January 19, 1869, which was seventeen days more than sixteen years before the filing of the bill; so that under the rule of the courts as held before the statute, by which the right to foreclose ceased only with the right to maintain an action for the debt, it was also barred as to him.

Perhaps it may be doubted whether this 11th section, which in terms applies only to "a mortgage or deed of trust in the nature of a mortgage"—technical terms, having a well known common law meaning—embraces a lien of the kind here in question, notwithstanding it may be within the reason of the law. *Bedell v. Jenney*, 4 Gilm. 205 *et seq.*, and authorities there cited; *Hazel v. Shelby*, 11 Ill. 9. But since the earlier strictness of construction has been somewhat relaxed (*C. & N. W. Ry. Co. v. Jenkins*, 103 Ill. 595-6), we are not prepared to hold it does not.

Assuming it does, it becomes important to ascertain what lien or liens this bill seeks to enforce, and the relations of these successive grantees, by virtue of their several assumptions and of their ownership of the equity of redemption, to each other, to the original mortgagee, McConnell, and his assignee, the complainant. Counsel for appellees insist it is the lien retained by the deed from Hamilton to Weer of December 25, 1873, and none other. If this were true, we might not deny that the bill was rightly dismissed. Considered solely as an original, independent lien, it may be that it was barred by the statute, though if it were legally possible to ar-

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rest its running, he certainly did it by his repeated payments of the interest. But for reasons here following we do not feel called on to express an opinion upon that question.

The counsel who thus insist, however, open their argument here with the statement that "this was an action by bill to foreclose a mortgage * * * executed by Jackson Rusher on the 16th of July, 1866." This statement, we apprehend, is correct so far as it goes, but does not fully present the character and object of the bill. The bill itself does not explicitly state them, but besides the reservation in the deed to Rusher, it is careful to set out also the retention clauses in the several subsequent conveyances, and expressly avers they are all valid and subsisting liens and inured to complainant's benefit. It thus relies upon each and all, and if either was subsisting it was prior to the claims of appellees and warranted the relief asked.

Here then, were a promissory note assigned to appellant before its maturity, and several successive and distinct, but not unrelated liens by way of mortgage to secure it, executed before there was any statute limiting the time within which foreclosure might be had. Were they all barred by the Act of 1872?

The following general propositions are so familiar that we need only to indicate them with the utmost brevity:

The assignee of a note secured is regarded in equity as the purchaser of all the securities and remedies attached to it. *Vansant v. Allmon*, 23 Ill. 30; *Lucas v. Harris*, 20 Ill. 165.

A mortgage, considered as security, is only an incident to the debt, and until the Act of 1872 took effect subsisted against a bar by limitation just as long as its principal. *Lock v. Caldwell*, 81 Ill. 417; *Hagan v. Parsons*, 67 Ill. 170; *Medley v. Elliott*, 62 Ill. 532; *Pollock v. Maison*, 41 Ill. 546; *Olds v. Cummings*, 31 Ill. 188; *Roberts v. Lawrence*, 16 Ill. App. 455, and cases last above.

The courts do not give to statutes of limitation a retroactive effect by construction, but only upon a clear expression of the Legislative will. *Conway v. Cable*, 37 Ill. 90; *Marsh v. Chestnut*, 14 Ill. 227; *Thompson v. Alexander*, 11 Ill. 54;

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Smart v. Morrison, 15 Ill. App. 228-9. This rule has been expressly applied to the act in question. Dickson v. C., B. & Q. R. R. Co., 77 Ill. 332; Hyman v. Bayne, 83 Ill. 256; Means v. Harrison, 114 Ill. 248; Smart v. Morrison, 15 Ill. App. 228.

The law in force when a cause of action accrues will govern, unless the later one clearly indicates otherwise. Beasley v. Spencer, 25 Ill. 216.

Every promise by the debtor to pay the debt, expressed or implied, arrests the running of the statute, and such a promise is implied by his partial payment of the principal or any interest. Kallenback v. Dickinson, 100 Ill. 427; Carroll v. Forsyth, 69 Ill. 127; Lowery v. Gear, 32 Ill. 382. Payment by another for him, by his authority or with his consent, is the same in effect. Kallenback v. Dickinson, 100 Ill. 427; Mellick v. De Seelhorst, Beecher's Breese, 222.

All who claim under a mortgagor, with notice of the mortgage at the time they acquire their interest, whether actual or constructive, are bound by his payment as a new promise arresting the course of the statute against the mortgage debt. Emory v. Keighan, 88 Ill. 482; Hughes v. Edwards, 9 Wheat. 489; Heyer v. Pruyn, 7 Paige, Chy. R. 465; Palmer v. Butler, 36 Iowa, 581-2.

The application of these propositions is obvious. The statute in force when the note here in question was given and matured was that of November 5, 1849, which limited the right of action thereon to sixteen years from the time the cause accrued. It has been seen that the last payment on account of it by Rusher, the maker, in person, was made a little more than sixteen years before the commencement of this suit. But Hamilton his immediate grantee of the equity of redemption in the mortgage premises, who was charged by him and assumed to pay it, and is presumed to have deducted from the price an amount sufficient for that purpose, made payments on account of it within the sixteen years next before the filing of the bill herein. Why, then, were not these, in effect, payments by Rusher, which arrested the running of the statute against the note as to him? And why are not the appellees,

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all of whom claim under him, with notice, also bound by them as to their effect upon the mortgage?

Counsel say that by his assumption of the debt Hamilton became principal debtor and Rusher surety, and that payment by the principal will not prevent the bar of the statute in favor of the surety; citing, *Kallenback v. Dickinson*, 100 Ill. 427. But the reason for this, as the case cited and the authorities there referred to show, is, that operating as it does in that behalf only as a new promise, it can bind only those by whom or whose authority it is made; and there can be no presumption that a principal, in making payment, acts for or by authority of his surety. Being primarily his own debt he pays it for himself. So of a co-contractor, or copartner after dissolution of the partnership. But, as the same authorities further show, it is otherwise when made for another and by his authority, express or implied, as by a surety for his principal, or by a copartner for his firm during the existence of the co-partnership.

We apprehend that Rusher could not, by any arrangement with Hamilton alone, affect his relation or liability to appellant, and that Hamilton, by his assumption of the debt and lien, became principal in his stead only as between himself and Rusher. In *Jones on Mortgages*, Sec. 740, it is said: "As between these parties (the mortgagor and his grantee assuming the debt) the purchaser then becomes primarily liable and the mortgagor only a surety for the payment of the debt," and in Sec. 741 the statement is repeated, in substance, with this addition: "The mortgagee may treat both as principal debtors and may have a personal decree against both."

Hamilton's assumption, then, did not, *ipso facto*, extinguish or change the liability of Rusher to appellant. Its effect was to give it an additional obligation and security at its option. There is no evidence in the record of its consent or intention to hold Rusher as surety only, unless it be the bare acceptance of interest from Hamilton. But apart from the deed there is nothing to show the character in which he made the payments, and none whatever as to that in which appellant recognized him. In such absence of proof the presumption would be it

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treated him as would best subserve its own interest without any violation of his rights, and a court of equity might well so hold upon the principle declared in *Edgerton v. Young*, 43 Ill. 464, and *Ætna Life Ins. Co. v. Corn*, 89 Ill. 170.

This would be as the agent of Rusher, the original debtor and mortgagor, who had conveyed to him the equity of redemption in the mortgaged premises and thereby expressly charged him to pay the debt. Rusher must have known that Hamilton's acceptance of the deed did not discharge or change his liability to the creditor. It was therefore a clear authority given to pay it for him.

In *Barger v. Durvin et al.*, 22 Barb. 68, after a discussion of the principle involved and a review of the authorities, the case and the law applicable to it are thus briefly stated by the court: "Here the defendants, within six years before this suit was barred as to them by the Statute of Limitations, conveyed their property to trustees, and directed them to pay this note among others, naming and describing it; to pay in full if their property was sufficient, if otherwise, to pay a ratable dividend upon it, with other debts. Is there any difference in principle between this authority and that conferred by an express, written direction by the debtors to an agent to pay a particular amount upon a given debt? There could be no doubt that a payment by an agent, under such an authority and direction, would be equivalent to a payment by the debtor himself, and would afford incontrovertible evidence of liability and a new promise.

"I can see no reason why the act of the assignees of these defendants, under all the circumstances of the case, should not be treated as an act of the defendants themselves, by an agent duly authorized for that purpose, and as evidence of a new promise by the debtor to pay this note." There appears to be no substantial difference in principle between that case and the one at bar.

Still more analogous, and more nearly than any other we have found, is that of *E. J. Cockfield, tutor, etc., v. Farley et al.*, 21 La. Ann. 521. It was a contest between mortgage creditors for the proceeds of the sale of the mortgaged

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premises in the hands of the Sheriff. At the succession sale of Wm. Cockfield, Mrs. Myers purchased the land, giving for a part of the purchase money the note held by plaintiff, payable May 1, 1861, secured by mortgage upon the same premises. On May 12, 1859, she conveyed it to Lewis, who assumed her outstanding note and gave others of his own secured by like mortgage, which were held by the defendants. On Nov. 21, 1865, Lewis sold it to Pipes, who assumed the payment of all, and on March 12, 1866, paid a large sum on the note of Mrs. Myers.

The premises were sold at the instance of defendants under the mortgage executed by Lewis to Mrs. Myers. Plaintiff opposed the application of the fund to the mortgage of defendants, claiming priority for the balance due on her note. Defendants claimed that said note was barred by the Statute of Limitations as to her, and consequently her mortgage also, but admitted it was valid and subsisting as against Lewis, who had assumed its payment, and so insisted that, being secured only by the same mortgage which also secured those held by them, it could only be paid concurrently with them. The court said: "We do not concur in the view taken by the defendants. A large payment was made on the note before prescription accrued by Pipes, who in a notarial act assumed to pay the note for the maker, Mrs. Myers. We regard the payment made by the purchaser, who retained in his hands the amount due to the original vendor and had assumed to pay it, as an interruption of prescription as to both himself and the original debtor, being made in discharge of the obligation of the latter with her implied assent." Plaintiff's claim was accordingly given preference. Here payment by a remote grantee of the mortgagor, who had assumed to pay the debt, was held to arrest the running of the statute in favor of the mortgagor because of implied authority from her to make it. By this rule even the payments by Weer would have kept the debt alive as against Rusher, much more those made by Hamilton, the immediate grantee, expressly charged to make them.

We hold that, as to appellant, Hamilton was the agent of Rusher, duly authorized to make these payments for him.

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Here, then, were a promissory note and a mortgage to secure its payment, executed before the limitation law of 1872 took effect, on account of which payments were made by the maker and mortgagor through his duly authorized agent within sixteen years before the filing of this bill. And the question remains whether that act applies to and bars such a mortgage after ten years from the time it came into effect.

It is not claimed that this act which reduced the limitation of actions on promissory notes from sixteen to ten years, would affect any right accrued on this note under the act previously in force. Even without the saving by Sec. 24 of rights accrued under acts thereby repealed, the right of action on this note for sixteen years after the last payment upon it by the maker or by his authority would have been saved, because the courts will not give to limitation laws a retroactive operation without a clear expression of the Legislative intention to that effect. But it is contended that since there was no statute previously in force limiting the time for foreclosure, the act might operate upon existing mortgages without violating the rule against retroaction; and the general proposition thus contended for is sustained by the Supreme Court in Gridley v. Barnes, 103 Ill. 211. But does it apply to mortgages previously given to secure promissory notes?

The saving clause in Sec. 24 is that this section, which is held to mean this act in Hyman v. Bayne, 83 Ill. 256, "Shall not be construed so as to affect any rights or liabilities, or any causes of action that may have accrued before this act shall take effect;" that is to say, the express repeal of the Act of Nov. 5, 1849, which was in force when appellant's rights upon this note accrued, shall leave them in full force as they were under that act.

In Means v. Harrison, 114 Ill. 248, the Supreme Court noticed that this saving clause is of unusual breadth for such a provision, embracing "rights or liabilities" as well as "causes of action," and held it applicable to a note made before, but upon which a cause of action did not accrue until after the act took effect. They say "some additional meaning should be allowed

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to the words 'rights or liabilities' and that the act was designed to be wholly prospective in its operation, and not to affect contracts then existing." The Appellate Court for the Fourth District had before taken the same view. *Smart v. Morrison*, 15 Ill. App. 228.

This construction would seem to save all existing remedies and means for realizing rights and causes of action accrued or accruing under the repealed acts.

To the note here in question there was attached, as incident to it, what was not attached to notes in general—something more than a right to bring an action at law upon it at any time within sixteen years from its maturity or from the date of the last payment on account of it. There was a "right" to proceed also in equity within the same time, to enforce a specific lien for the amount due, upon certain lots of land, and a corresponding "liability" of the maker, as owner of the equity of redemption in those lots, and of those claiming under him, though not parties to the note, to have them sold under a decree for that purpose. This was a very substantial right, being not merely a remedy in addition to the action at law, but a security also. It came with the note and depended wholly upon it. Doubtless it was the inducement to the acceptance of the note by McConnell, and by the appellant. The right to foreclose accrued with the cause of action upon the note, and would have had no existence without it. We are therefore of opinion it was among the "rights or liabilities" saved by the provision in section 24 of the Act of 1872.

Thus the original debt and lien for its security, created by Rusher July 16, 1866, were still subsisting and in force as against him and the appellees who claim through him, with notice, when the bill herein was filed. By parity of reasoning the additional lien created by Hamilton by his acceptance of the deed from Rusher, of Jan'y 19, 1869, was also then in force and binding upon him and them. He fully acknowledged and promised anew to pay the debt by repeated payments of the interest due upon it, within the sixteen years next before the commencement of this suit and by his retention of the lien in his deed to Weer of December 25, 1872, of all which the appellees had notice.

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Since the bill did not ask for a personal decree, and Rusher (who is deceased) and Hamilton had parted absolutely with their interest in the mortgaged premises, there was no necessity to make them parties, or if there was, the bill should not have been dismissed, but retained for amendment in that respect.

For the reasons above given the decree will be reversed and the cause remanded for further proceedings in conformity herewith.

The Supreme Court, since this opinion was written, has decided that the limitation law of 1872 does not apply to mortgages previously given to secure the payment of promissory notes. *McMillan v. McCormick*. Opinion filed at Ottawa May 15, 1886.

Reversed and remanded.

BENJAMIN L. T. BOURLAND

V.

GEORGE L. GIBSON AND THOMAS SNELL.

Action on Promissory Note—Failure of Consideration—Admission of Improper Evidence—Instruction—Pleading and Practice.

In an action on a promissory note, where the only issue on the trial was whether a deed of certain premises, then occupied by the maker under a contract of purchase on account of which the note was given, was to be delivered on the delivery of the note and in consideration thereof, it is *held*: That evidence tending to show the conveyance of said premises to a third party and the dispossession of the defendant since the bringing of the action on the note, was improperly admitted; that a certain passage in the opinion of this court in reviewing the record of a former trial of the case, on the question of a waiver by the defendant of his right to a deed on delivery of the note, is to be taken as a statement of an inference of fact based on the record then presented; and that in the opinion of this court it would still be proper for the court below to grant the defendant leave to amend his plea and to file others.

[Opinion filed May 19, 1886.]

Bourland v. Gibson and Snell.

APPEAL from the Circuit Court of De Witt County; the Hon. GEORGE A. HERDMAN, Judge, presiding.

Messrs. MOORE & WARNER, for appellant.

Messrs. STEVENSON & EWING, for appellee.

PLEASANTS, J. This case has previously been once in the Supreme Court and twice here. It was an action of *assumpsit* brought by appellant, as payee, upon a promissory note of appellees, dated February 22, 1875, due on or before February 22, 1876, for \$2,100, with interest at ten per cent. and given under these circumstances:

Gibson had made a trust deed of his homestead at El Paso to Bourland to secure a loan from Gen. Robert Patterson, under which the premises had been sold and conveyed to the latter. Afterward he arranged, through Bourland as Patterson's agent, to repurchase them and get a deed for \$2,000 in cash and his note for \$4,000, payable in five years with interest at ten per cent. secured by a trust deed of the same property. Bourland procured a deed from Patterson, which he held ready for delivery to Gibson upon his complying with the terms stated, and so advised him by letter of January 11, 1875, inclosing such a note and trust deed for execution. These were executed and returned together with a draft on Snell for the \$2,000, which the drawee declined to honor. Gibson being then unable to raise the cash required, his son obtained Bourland's consent to accept in lieu of it his note for \$2,100 (including \$100 for commissions) with Snell as surety, payable in one year with interest at ten per cent., in pursuance of which the note in suit was made and sent to Bourland, who acknowledged its receipt by letter as follows:

"PEORIA, ILL., February 26, 1875.

GEORGE L. GIBSON, Esq.—*Dear Sir:* Yours 24th inst. is received. I have proposed to Gen. Patterson to hold the papers, just as they now stand, until the \$2,000 is paid, and then convey the property back to you, and record the new mortgage for \$4,000.

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I now hold as security for the Patterson loan :

1. The original trust deed and note, \$6,000, foreclosed, and trustee's deed to Gen. Patterson on record.
2. New note, \$4,000, secured by the new mortgage, due in 1880, 10 per cent. semi-annually.
3. Your note, \$2,100, with Snell as security, due February 22, 1876, with 10 per cent.

If this last note is paid, the old note and trust deed are to be given up and the new mortgage to be recorded, and Gen. Patterson's deed to you (which I also hold) is to be delivered.

Yours truly,

B. L. T. BOURLAND."

This letter was on its receipt indorsed by Gibson "B. L. T. Bourland, statement, February 26, 1875," and filed away. On March 11, 1876, the suit was brought. The declaration contained a special count on the note and the common counts. Defendants plead that the note was given solely in consideration of an agreement that upon its receipt the deed from Patterson should be delivered, and that the deed had not been delivered, by reason whereof the consideration had wholly failed. Plaintiff replied, traversing the allegation as to the time when, by the agreement, the deed was to be delivered, and issue was joined thereon.

At the December term, 1876, a trial was had, resulting in a verdict for the defendants on which judgment was entered, but the Supreme Court reversed it on the ground that the verdict was against the evidence, finding that "the circumstances proved clearly show the deed was only to be delivered upon the payment of this note." *Bourland v. Gibson*, 91 Ill. 470.

At the December term, 1879, the cause was again tried with a like result, and that judgment was reversed by this court upon the same ground. 7 Ill. App. 227.

At the March term, 1882, a third trial was had, and the defendants again obtained a verdict, which the Circuit Court set aside.

At the August term next following, leave was granted to amend pleas filed and to file others, and the case continued.

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On November 24th defendants filed a plea setting forth that "after the last pleading, to wit: on the first day of July, A. D. 1878," Patterson by warranty deed conveyed the premises in question to Mrs. Harriet B. Farrell; that the note sued on was given together with the other note and trust deed mentioned solely in consideration of the agreement above stated; that the plaintiff has neglected and refused to comply with said agreement, and by the conveyance to Mrs. Farrell, his principal, and he have put it out of their power to comply; that defendants had no knowledge or information of said conveyance until about the first day of May, 1882; that at the next term they pleaded the foregoing facts in substance, but not being in form, a demurrer was sustained to said plea, and that leave was then and there obtained to amend it, under which leave this is filed.

A demurrer to that plea was also sustained, and upon the ground taken, that being a plea *puis darrein continuance* it was not amendable and waived all others, leave to amend was refused and judgment on the demurrer entered for the plaintiff for the amount of the note and interest; from which judgment defendants appealed.

This court, for reasons stated, held it was not such a plea, and that the demurrer, being general, did not reach merely formal defects; that its true character was that of a plea in bar of the action, and that as such it set up a good defense, to-wit, that upon receipt of the notes and mortgage mentioned the plaintiff was to deliver to Gibson the deed conveying to him the title to the land, and that after receiving them he refused to comply with his undertaking; that the averment of the conveyance to Mrs. Farrell added nothing to its validity and must be regarded as surplusage; that if it had been properly pleaded *puis darrein continuance*, then, upon the facts as found by the Supreme and Appellate courts, a very different question would have been presented, but that this defense was not before the court and it was then too late to plead it.

And in reply to the suggestion that as both of said courts on appeal had found that the defense pleaded was not proved by the evidence it would be useless to reverse the judgment

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for the error committed in sustaining the demurrer, it was further said: "We can not assume that appellants will not be able hereafter to prove the truth of their plea. The demurrer admits its truth, and the only duty of the court is to determine its sufficiency. Had the court, after sustaining the demurrer, proceeded to the trial of the cause upon the plea setting up the same defense, upon which issue had already been joined, no injury would have resulted to appellants, as the same defense could have been made; but the court in holding this to be a plea *puis darrein continuance*, and that it waived all former pleas, deprived appellants of all opportunity of making their defense." The judgment was therefore reversed and the cause remanded. For this opinion, containing a copy of the plea in full, see 13 Ill. App. 352.

Upon thus remanding the cause the plaintiff replied to said plea that "the said note was not given and delivered to the plaintiff in consideration that the plaintiff would deliver to the defendant, Gibson, the deed in said plea mentioned on the delivery to him of said note" on which issue was joined. And it seems to have been the only one made by the pleadings. The jury found for the defendants, and the court having refused a new trial and entered judgment on their verdict, the plaintiff took this appeal, and upon the record so brought here assigns for error the admission of improper evidence on behalf of the appellees and the refusal to admit proper evidence offered and to give proper instructions asked on behalf of appellant.

It appears that against objection by appellant the court admitted evidence that Patterson conveyed to Mrs. Farrell as stated; that she took possession along in 1878; that no offer to deliver a deed of the property to Gibson was ever made; that Patterson had been dead five or six years; that appellant's understanding of the agreement was, that if the note sued on was not promptly paid he could collect it by suit and yet keep the property for which it was given, and that \$2,000 of the amount belonged to Patterson's estate, but appellant had never paid it nor any part of it to him or to his estate.

Nearly all of this was elicited by direct examination of

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appellees' witnesses, and the little that was obtained on cross examination of appellant was not justified by the examination in chief.

We are unable to see how these facts, or any of them if they are such, could aid in determining whether the deed to Gibson was, by the agreement, to be delivered to him by appellant upon receipt of the note sued on, or only upon its payment. Upon the issue as made, therefore, appellees were not entitled to have the jury know them. Being known, or even suspected, they could hardly fail to prejudice appellant and his claim. We can not ourselves be unaffected by them. While as lawyers we may understand, and as judges hold, that in the plea of November 24th the averment of the conveyance to Mrs. Farrell was immaterial and surplusage, our sense of right can not but be alive to its bearing upon the real merits of the case.

The suit brought was an affirmance of the contract to reconvey to Gibson the homestead he had lost. Its object was to recover a considerable portion of the price; and that pending the suit the vendor should voluntarily dispose of the property so that he could not reconvey upon recovery and collection of the judgment, and yet proceed to recover and collect it, would strike the mind of a juror as being palpably unjust. He might understand that to Gibson it was really of very little consequence whether he got his deed before payment or not, so long as he was in possession and had appellant's letter showing his right to it upon payment, and so might regard the non-delivery of the deed as a poor excuse for non-payment of the note, but without further explanation would not see clearly why, though in default as to payment when due, he should still be made to pay after he was dispossessed, and the property absolutely sold and delivered by his vendor to another. It can hardly be doubted that this apparent hardship and injustice had great weight with the jury. And yet, while not undertaking to determine, because the record does not present the question, whether these facts can now be made available for defense against this note by any form of plea at law or even by bill in equity, we are constrained to hold that, upon the issue as made in this case, they were inadmissible.

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In the opinion reported in 7 Ill. App. 227, it was said: "But even if the contract was as now claimed by Gibson, he waived his right to the deed on the delivery of the note by his acquiescence in the claim of Bourland that the deed was not to be delivered until the payment of the note in full."

Upon this expression an instruction was asked as to the legal effect of the receipt by Gibson of Bourland's letter of February 26th and his failure to reply, the refusal of which is also urged as error. We apprehend that in the passage quoted the court was only stating an inference of fact which it drew from all the evidence in the record bearing upon it, and not a conclusive presumption of law that by failing to object to the statement in the letter Gibson acquiesced in its correctness. That was a question for the jury. The instruction was therefore rightly refused, but for the error in admitting the evidence above referred to the judgment will be reversed and the cause remanded.

We think it would be proper to grant leave to amend the plea and to file others if desired.

Reversed and remanded.

WESLEY BEST

v.

PERMELIA FARRIS, HAMPTON W. WALL ET AL.

Construction of Will—Division of Estate per Capita.

The words "equally divided among my heirs," when used in a will, unless a different intention appears from the context, mean an equal division of the testator's estate *per capita*.

[Opinion filed May 21, 1886.]

APPEAL from the Circuit Court of Macoupin County; the Hon. J. J. PHILLIPS, Judge, presiding.

Messrs. PALMER & CHAPMAN, for appellant.

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Best v. Farris and Wall.

It is an inflexible canon of construction, and "the rule has been rigidly adhered to by all courts, that a testator must be presumed to use the words in which he expresses himself in their strict and primary sense, unless from the context of the will it appears that he has used them in a different sense. The legal and technical meaning must be enforced when unexplained." *Richardson v. Miller*, 62 Ill. 417.

The words "equally, or share and share alike, or to be equally divided, imports an intention. When they are used in a will they mean a division *per capita*." *Richardson v. Miller*, 62 Ill. 417.

If these rules are to be given any force, they point unerringly to a division *per capita* in this case.

To hold that the proper mode of distribution is *per stirpes*, is to hold that the words of the testator "and the money or proceeds thereof be equally divided among my heirs," must be stricken from the will as meaningless and void, since the money would have gone to the heirs *per stirpes* under the statute without them.

We insist that they must be held to have been used by the testator in their primary, legal and technical sense—import intention, were used advisedly, thrice repeated, and mean a division *per capita*, and that the order of the trial court directing a division *per stirpes* is wrong and should be reversed.

Messrs. RINAKER & RINAKER, for appellee.

The will gives to a class, to the heirs—does not mention the names of the persons who compose that class, hence we must refer to the statute of descents, and there the heirs take as in case of intestacy. *Richards v. Miller*, 62 Ill. 417.

In devises to a class, as to heirs, it is held the estate is taken by the devisees *per stirpes* and not *per capita*. *Walker v. Griffin*, 11 Wheat. 375 ; *Hall v. Hall*, 140 Mass. 267.

This case, however, we think is settled by the decision of the Supreme Court in the case of *Kelley v. Vigas*, 112 Ill. 242, which is so nearly like this that there seems to be no substantial ground for a distinction between them.

PLEASANTS, J. The will of George W. Farris contained the following provisions: "I give and bequeath unto my wife, Nancy, all the lands now owned by me, during her natural life. And it is my will at her death the lands be sold and the money or proceeds thereof be equally divided among my heirs." He died in 1865, leaving his wife, two sons, two daughters, and three grandchildren, children of a deceased daughter. These were his heirs apparent when he made his will, the deceased daughter having died before that time. His wife died in 1882, but the others all survive, and the single question in this case, which is for partition, is whether they take *per stirpes* or *per capita*. The court below held the former, and ordered distribution accordingly. Best, holding the interests of the grandchildren, took this appeal.

A devise to "heirs" *simpliciter* is *per stirpes*. Richards v. Miller, 62 Ill. 417. The term designates a class only. It is composed of those upon whom the statute would cast the inheritance if there were no will. Ibid. p. 424; Rawson v. Rawson, 52 Ill. 62. And since, to ascertain who they are, resort must be had to the statute, it will determine also the proportion in which they take (Richards v. Miller, 62 Ill. 417); not, however, because the devise is to a class whose members are to be thus ascertained, but because it is to such a class *simpliciter*. The sense of the rule is, that as in such case the will itself does not indicate the proportion, it gives just as the statute would give without the will, and therefore the devisees must take just as they would take under the statute without the will; which is *per stirpes*.

For the same reason the converse is true also: that if the will does indicate the proportions, it must in that respect control the statute. If they do not conflict the statute determines; if they do, the will.

In this case the devise is not to the heirs *simpliciter*, that is, without indicating how much or what proportion the individuals composing the class are respectively to take. The provision is that the subject be "equally divided among my heirs"—a positive expression, which of itself signifies, plainly and exclusively, that all persons of the class mentioned without

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limitation or distinction are intended, and that each is to take, not what the statute would give, but the particular proportion expressed by the fraction of which one is the numerator, and the whole number of the class, whatever it may happen to be, the denominator. Our own Supreme Court has repeatedly declared, in harmony with the unbroken current of authority elsewhere, that the words "equally," "share and share alike," "to be equally divided," import an intention, and when used in a will mean a division *per capita*. *Richards v. Miller*, 62 Ill. 417; *Kelley v. Vigas*, 112 Ill. 242; 2 *Jarman on Wills*, 197 *et seq.* and notes (5th Ed.); *Theobald on the Law of Wills*, 277.

It is true, as in other cases of written instruments, that if from the will, as a whole, a different intention appears, it will control, notwithstanding such words. See authorities last above cited. Also, *Walker v. Griffin's Heirs*, 11 Wheat. 375; *Daggett v. Slack*, 8 Metc. 450; *Fisher v. Skellman*, 3 E. C. Green (18 N. J.) 229. And further, if from such words and the context there is still good reason to doubt the intention, that doubt is to be solved in favor of a distribution according to the statute, as for intestacy. *Lyon v. Acre*, 33 Conn. 224.

This explains the decision in *Kelley v. Vigas*, 112 Ill. 242, on which appellees rely. In that case the testator left a daughter, and four grandchildren—children of a son who died before making of the will. After a devise to his wife for her life, and certain specific bequests, the remainder of the estate was left "to be divided equally among his (my) heirs at law," and the question was whether they took *per stirpes* or *per capita*. It was held that they took *per stirpes*. But the court fully recognized the law as above stated, and reached its conclusion only by the application of the rule by which the natural and legal effect of the term "equal" was in that case controlled by the context as showing, on the whole, a different intention. In the opinion it is said, "The will in this respect is by no means free from ambiguity;" and further, "It is understood the words 'equal among,' or 'equally,' or 'share and share alike,' when used in a will, mean a division of the estate *per capita*, but this meaning of these words may be controlled by

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the context, and is often so done. That is the case here." The portion of the context is then indicated from which it is inferred the testator "intended to make an equal division of his estate between his daughter and the family of his deceased son."

From all which, and the rigid adherence to the rule of construction as declared in the case above cited from 62 Ill. on p. 424, we think it a just inference that, without the aid of the context, the court would have held, upon the strength of the word "equal," that it was a devise *per capita*.

Inasmuch, then, as there is no such context to control the word "equally" in the case at bar, we regard that of Kelley v. Vigas as an authority for holding the devise here to be a devise *per capita*, and so we hold.

The order of distribution of the court below is therefore reversed, and the cause remanded for further proceedings in conformity herewith.

Reversed and remanded.

AUGUST KOENIG

V.

DAVID HADDIX.

Party Walls—Presumption as to Ownership—Promise, Unsupported by Consideration, Void.

1. Where, before either of two adjoining owners acquired his interest, a wall was built on the line separating two lots owned by them, and it does not appear when, by whom, or on what terms it was erected, the presumption is that it belongs to such adjacent owners, each having acquired an interest in it free from any obligation to contribute to the other.

2. A promise by one of such owners to the other, made under a mutual mistake as to the location of the wall, which was in fact located on the line, is void, being without consideration.

[Opinion filed May 21, 1886.]

APPEAL from the County Court of Morgan County; the Hon. M. T. LAYMAN, County Judge, presiding.

Koenig v. Haddix.

Mr. OSCAR A. DELEUW, for appellant.

This court can not judicially determine which survey was, or is now, correct.

There was a valid agreement to pay for half of the wall as a party wall, and the court below erred in disallowing the plaintiff's claim. *Husk v. Flentye*, 80 Ill. 258.

The judgment of the County Court was clearly against the weight of the evidence and the law, and its judgment should be reversed. *Sanders v. Martin*, 2 Lea, 213.

Messrs. MORRISON & WHITLOCK, for appellee.

Even if the construction of the wall partly on the Haddix lot, or what is now the Haddix lot, would have given the owner of the Koenig lot at the time the wall was constructed the right to compel contributions, that right did not pass to Mr. Koenig under the sale made by the Sheriff, at which he purchased. *Holden v. Gibson*, 16 Ill. App. 411, and the cases there cited.

If there ever was any implied agreement to pay for the wall when it should be used by the occupant of the Haddix lot for the purpose of a building on the same, it was one personal to the parties, and not one which passed by deed to the grantee of the Haddix lot.

The case was tried by the court, sitting as a jury, and that court had the witnesses present, and was better able to judge of the weight to be given to the evidence of Baldwin than this court can be. And in such cases, the evidence being conflicting, the court will not reverse, unless the finding is manifestly against the evidence; this can not be said to be the case here.

Besides, there was no consideration for such a promise, if made as detailed by Baldwin at the time mentioned.

PLEASANTS, J. These parties owned adjoining lots in Jacksonville. On appellant's was a brick building, erected before he bought, in 1879. On appellee's, when he bought in 1884, were some straggling shanties which he at once removed with a view to the erection of a brick building, and the work was

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begun in April, 1885, under Montgomery as contractor. When the foundation was about completed, appellant told Montgomery he must have pay for the one-half of his north wall if they were going to join on it. Montgomery told appellee, who directed him to get a survey made. This was done by the County Surveyor, and it showed that appellant's lot extended five inches beyond the wall. Appellee went with Montgomery to see appellant, informed him of the survey and its result, and thereupon offered to pay him \$125, in thirty days, for the use of his north wall as a party wall. Appellant agreed to this, and the work proceeded. On the following day appellant told Montgomery that he did not understand he was to give appellee this strip of five inches besides the wall. Montgomery said he supposed it was fully understood, and that appellee had just gone East on the Decatur Accommodation. Appellant said he didn't think the surveyor understood his business anyhow, and that he must have pay for the ground. Montgomery then said something must be done at once, and suggested that Prof. Crampton be secured to make the survey, to which appellant agreed. Crampton was seen, but on coming down with his instruments and learning which lot was to be surveyed said it was of no use as he had surveyed it March 15, 1884, for Berkheiser, the then owner of appellee's lot, and that it included four and a half inches of this wall on the south, and eight inches of another on the north line.

Montgomery and Crampton went together to appellant and informed him of what this survey showed, upon which he said it was all right, and told Montgomery to go ahead with the work.

The wall was accordingly so used, and is worth the money claimed for it, but when appellee returned and learned these facts he refused to pay, whereupon this suit was brought.

The declaration is in *indebitatus assumpsit*, to which the general issue was filed. On the trial, which was by the court without a jury, the finding and judgment were for the defendant, and exceptions and appeal were duly taken.

The above statement is an abstract of the testimony of Montgomery, who was produced as a witness by the plaintiff.

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It was disputed in no particular, and covers all the ground in the case.

We presume the court considered the comparative merits of the two surveys, and upon the evidence found in favor of Crampton's, from which it would seem that the wall in question, as well as the one on the north line, was intended for a party wall. When, by whom or on what terms they were erected does not appear, but both are partly on appellee's lot, and were built before either of the parties acquired his interest. The presumption is that they belonged respectively to the owners of the adjacent lots in common. Appellant by his deed got no title to the four and a half inches on appellee's side of the line, nor can it be presumed that his predecessor in title had any unsatisfied claim for contribution against appellee's, nor, if he had, that it passed to appellant or against appellee. The promise sued on, having been made under a mutual mistake of a material fact and without any real consideration, is therefore not obligatory.

Judgment affirmed.

JAMES M. SELLS

V.

THE SANDWICH MANUFACTURING COMPANY.

Practice—Instructions—Remittitur.

1. Where the jury could not have been misled, although the instructions were somewhat inconsistent, the judgment will not be reversed on appeal.
2. Where the judgment improperly includes attorney fees, this court will permit the appellee to remit the amount of such fees.

[Opinion filed May 21, 1886.]

APPEAL from the Circuit Court of McLean County; the Hon. O. T. REEVES, Judge, presiding.

Messrs. TIPTON & BEAVER, for appellant.

Sells v. The Sandwich Mfg. Co.

The judgment is for more than the demand on the back of the summons issued by the Justice of the Peace, with the accrued interest on the same. A plaintiff can not recover more than he claims, and if he takes judgment for more it is error. *Brown v. Phillips*, 6 Ill. App. 250 ; *T., P. & W. R. R. Co. v. Pence*, 71 Ill. 274 ; *Bidgely v. Heald*, 4 Gil. 64 ; *Dowling v. Stewart*, 3 Scam. 195 ; *Ellis v. Snider*, Breese, 336.

In the note or agreement sued on there is a provision for the allowance of \$10 attorney's fee. It was error to include this sum in the verdict and judgment. *Byers v. Nat. Bank*, 85 Ill. 423 ; *Dowty v. Holtz*, 85 Ill. 525 ; *Easter v. Boyd*, 79 Ill. 355 ; *Clark v. Morgan*, 13 Ill. App. 597.

Mr. C. D. MYERS, for appellee.

Per Curiam. Appellee brought this suit before a Justice of the Peace on the last of two notes given by appellant for a harvester and binder sold to him, which was "to be made to do good work or to be replaced by a new machine." On appeal the plaintiff got a verdict and judgment for \$175.48, damages.

It appears that a new machine was given. If it did good work, or was absolutely accepted, the defendant was liable. On both these points the evidence was conflicting, and the instructions were not strictly consistent; but on the whole we think the jury could not have been misled, and perceive no sufficient reason for disturbing their finding for plaintiff.

The amount, however, improperly included ten dollars for an attorney fee (for which the note provided if not paid when due and suit should be brought thereon) which appellee here remitted by leave of this court. The judgment will be affirmed for \$165.48.

Judgment affirmed.

Myers v. Deering.

C. D. MYERS
V.
WILLIAM DEERING ET AL.

Action against Assignee—Jurisdiction of County Court, Exclusive.

The Circuit Court is without jurisdiction of an action against an assignee, claiming under an assignment for money had and received, the jurisdiction of the County Court being exclusive.

[Opinion filed May 21, 1886.]

APPEAL from Circuit Court of McLean County; the Hon. O. T. REEVES, Judge, presiding.

Messrs. C. D. MYERS and T. F. TIPTON, for appellant.

Messrs. KERRICK, LUCAS & SPENCER, for appellee.

We insist that Myers got no title to the accounts as assignee that he can set up against our right; that the money belongs to Deering under the commission contracts, and that Myers does not hold it in the capacity of an assignee, but simply as an individual who has received money to Deering's use.

An assignee for the benefit of creditors is a mere naked trustee. His appointment in no wise changes the effect of contracts made by the assignor. He takes no right the assignor did not have, and his appointment does not bar or take away any right a party may have against the assignor. He succeeds only to the rights of the assignor, and is affected by all the equities against him. Burrill on Assignments, Sec. 391 (4th Ed.) and cases cited; Eames v. Mayo, 6 Ill. App. 334.

The assignee took no title whatever to these accounts. They were not the property of Coale, and he could pass no title to them. They were the proceeds of the property of appellee. Myers, as an individual, holds money which in equity and good conscience belongs to Deering.

PLEASANTS, J. On trial by the court below without a jury, appellees recovered judgment for \$418.62 as money had and received by appellant to their use.

Myers v. Deering.

They were engaged in the manufacture and sale of agricultural implements, extras, twine, etc., at Chicago, and Coale and White in the sale of like articles, on their own account and also on commission, at Bloomington.

In October, 1883, these parties entered into a written agreement whereby the latter were made agents of the former to sell their products on terms therein specified.

In November of the same year Coale and White, in writing, ordered of appellees a quantity of twine on conditions stated, a part of which was delivered in several shipments, with shipping bills referring to said agreement and order and containing other matter not necessary to be here set forth. After its receipt Coale bought out the interest of his partner, and later, having sold the twine in his own name, in the usual course of business, in lots to different parties, some for cash and some on credit, in July, 1884, made a general assignment for the benefit of his creditors, to appellant. Under this assignment appellant took the stock, notes, books, etc., in possession of Coale, and, on account of the twine so sold on credit, collected and still retains the money, for which, after demand therefor duly made of Coale and of him, appellees brought this suit.

They claim that the twine in question was held by Coale for them, to be sold by him as their agent and upon commission only, and so that the proceeds did not pass by the assignment. Appellant insists that Coale and White purchased it of them and upon its delivery became the absolute owners.

The controversy is upon the true construction of the papers mentioned, which are not herein more fully set forth because we are of opinion that as between these parties the Circuit Court had no power in the first instance to settle it. Since the money here sued for was actually in the hands of appellant, claiming under the assignment, the jurisdiction of the County Court under the statute had attached and is exclusive. *Hanchett v. Waterbury*, "Legal News," Vol. 17, p. 412; *Freydendall v. Baldwin*, 103 Ill. 325.

The judgment of the Circuit Court will therefore be reversed.

Judgment reversed.

 Brown and Brown v. Miner, Frost and Hubbard.

JAMES BROWN AND MARGARET BROWN
 V.
 MINER, FROST & HUBBARD.

Practice—Error—Assignment of, in Favor of One not Joining in Writ—Issue as to Sanity of Party—Discretion of Court—Sufficiency of Officer's Return—Findings of Decree—Presumption—Recovery of Advances for Payment of Taxes.

1. Errors which only affect one who did not join in the writ of error, can not be assigned on his behalf.

2. Where, taking the statements in an officer's return together, it appears that process was properly served, the return is sufficient.

3. In chancery the question whether an issue as to the sanity of a party should be referred to a jury is, except in certain special cases, entirely within the discretion of the court.

4. Where there is no bill of exceptions nor certificate of evidence, the presumption is that the findings of the decree were warranted by the proof.

5. Upon the foreclosure of a mortgage the allowance to the complainants of advances for the payment of taxes made after the filing of the bill, is held to have been improper under the prayer for general relief—the contingencies which would require such payment by them being set forth in the bill.

[Opinion filed May 21, 1886.]

IN ERROR to the Circuit Court of Scott County; the Hon. CYRUS EPLER, Judge, presiding.

Messrs. CALLON & THOMPSON, for plaintiffs in error.

If defendants in error paid any taxes after filing their bill, they should have set up the fact in a supplemental bill. It was error to grant relief not prayed for nor justified by the allegations of the bill. The general prayer does not cure the error in the absence of appropriate allegations. "The decree must conform to the prayer of the bill." Hall v. Towne, 45 Ill. 493; Ward v. Enders, 29 Ill. 519; Dodge v. Wright, 48 Ill. 382; DeLeuw v. Neely, 71 Ill. 473; Gunnell v. Cockerill, 84 Ill. 319.

The issue as to the insanity of James Brown should have

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21	60
67	680
91	60
87	68.

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been tried by a jury. *Myatt v. Walker*, 44 Ill. 485; *Pankey v. Raum*, 51 Ill. 88; *Hahn v. Huber*, 83 Ill. 243.

The service of the summons on James M. Brown was not in compliance with the statute. "In serving process by copy the return of the officer must show a strict compliance with the statute before the court can obtain jurisdiction of the person."

This case is almost identical with the case of *Hochlander v. Hochlander*, 73 Ill. 618, in which the return was held to be "too indefinite and uncertain, as it fails to show what the officer read, or of what he served a copy."

Messrs. J. M. RIGGS and J. A. WARREN, for defendant in error.

"A party dissatisfied with the findings of fact upon which the decree is based must bring the testimony before this court that will show that such facts were erroneously found, otherwise this court will presume the evidence warranted the finding of fact as recited in the decree." *Groendyke v. Coffeen*, 109 Ill. 334.

Plaintiffs in error can not assign error for said James M. Brown, nor complain of any finding against him not shown by the record to injuriously affect their rights. *Clark v. Marfield*, 77 Ill. 258; *Havinghorst v. Lindberg*, 67 Ill. 468; *Kennedy v. Kennedy*, 66 Ill. 190; *I. C. R. R. Co. v. Gills*, 68 Ill. 317; *Richards v. Green*, 78 Ill. 525.

The doctrine of the Supreme Court is not that an issue shall be made to a jury in all cases in equity involving questions of insanity. *Hahn v. Huber*, 83 Ill. 244; *Milk v. Moore*, 39 Ill. 584; *Dowden v. Wilson*, 71 Ill. 486; *Fanning v. Russell*, 94 Ill. 386.

James M. Brown not having joined in prosecuting the writ, no error can be assigned on his behalf, nor can plaintiffs in error assign for error any action of the chancellor not injuriously affecting their interests. *Kennedy v. Kennedy*, 66 Ill. 190; *Havinghorst v. Lindberg*, 67 Ill. 468; *I. C. R. R. Co. v. Gillis*, 68 Ill. 317; *Clark v. Marfield*, 77 Ill. 258; *Richards v. Green*, 78 Ill. 525.

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In an ordinary cause in chancery it is within the discretion of the chancellor whether to take the verdict of a jury on a question of sanity. Rev. Stat., Ed. 1885, Chancery Practice, Sec. 40; Meeker v. Meeker, 75 Ill. 260; Long v. Long, 107 Ill. 210.

The verdict of a jury should only be taken where the evidence is voluminous, the facts complicated and the question doubtful. Milk v. Moore, 39 Ill. 584; Dowden v. Wilson, 71 Ill. 486.

The chancellor having recited in the decree that the master had taken and reported the testimony, and that report not appearing on the files, it will be deemed to have been lost. Hess v. Voss, 52 Ill. 472.

Where evidence in chancery cause is not otherwise prevented, the recitals and findings in the decree are conclusive as to the facts. Sheen v. Hogan, 86 Ill. 16; McIntosh v. Saunders, 68 Ill. 128; Morgan v. Corlies, 81 Ill. 72; Davis v. Christian Union, 100 Ill. 313; Groendyke v. Coffeen, 109 Ill. 334; Hannas v. Hannas, 110 Ill. 53.

If plaintiffs in error desired to question the recitals or findings of facts in the decree, it was their duty to cause all the evidence to be preserved. McIntosh v. Saunders, 68 Ill. 128; Morgan v. Corlies, 81 Ill. 72; Groendyke v. Coffeen, 109 Ill. 334.

PLEASANTS, J. This was a foreclosure bill filed April 15, 1884, by defendants in error, who were bankers, against plaintiff in error, as mortgagors, and other defendants, as having or claiming some interest in the mortgaged premises, but alleged to be subsequent and subject to that of complainants.

It set forth the note and mortgage *in hæc verba*, which were dated April 6, 1883, for \$13,500, payable on or before five years, with annual interest at seven per cent.; and provided that in default of payment of such interest, or any part thereof, at any time before maturity of said note, or in case of waste, or of non-payment of taxes or assessments on the mortgaged premises, by the mortgagors, the whole amount of the principal and accrued interest should thereupon be-

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come due and payable at the option of the legal holder, and that out of the proceeds of sale under any decree of foreclosure of said mortgage should be paid—first, the expense of advertising, selling and conveying said premises, together with \$100 for solicitor's fees and all moneys advanced for taxes, assessments and other liens, and then the principal of said note, whether due or not, and the interest accrued thereon. It averred that default was made in the payment of the interest due April 6, 1884; also that the taxes for the year 1883 had long since become due and payable, but the mortgagors had wholly neglected and failed to pay the same or any part thereof, and that said taxes still remained wholly due and unpaid; and the prayer was that an account be taken of the amount due on said note and mortgage, and its payment decreed to be made by a short day, with \$100 for solicitor's fees, and, in default thereof, for a sale and foreclosure in the usual form.

All the defendants, excepting plaintiffs in error, were defaulted. Margaret Brown filed an affidavit, setting forth that before and at the time of the execution of said note and mortgage, her husband and co-defendant, the said James Brown, was and still is *non compos mentis*, and praying that a guardian *ad litem* be appointed for him. The appointment was made, and the guardian filed his answer, stating the mental condition of his ward, calling for strict proof; and submitting his rights and interests to the protection of the court. Said Margaret also answered, admitting the execution of the note and mortgage as alleged, but averring that the consideration thereof was mainly indebtedness due complainants from the firm of August & Brown, of which her husband had been a member; that upon its dissolution its books of account, by agreement of complainants and said firm, were left with said August for settlement and collection; that he collected money enough to liquidate said indebtedness of complainants, which was deposited in their bank to be credited thereon, but said complainants afterward, in violation of said agreement and without the knowledge of Brown, permitted him to withdraw it for other uses, and that the residue of said consideration was money loaned by complainants

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to said Brown, with notice of his mental incapacity to transact ordinary business, which is again averred as in the affidavit above referred to.

To these answers a general replication was filed, and besides the papers mentioned and the process and returns thereof, the transcript of the record shows only the final decree of November 21, 1884, which purports to have been made on a hearing upon said pleadings, "and also the proofs taken and reported by the master in chancery of this court, and testimony heard in open court."

It recites the default of the other defendants, the appointment of a guardian *ad litem* for said James Brown, the entry of a rule upon him and said Margaret to answer, and an order that "on notice of filing such answers and replication thereto the cause stand referred to the master to take proof; that the court now found the allegations of the bill, which are specifically set forth, to be true; among other things, that the taxes on the mortgaged premises for the year 1883 were due before the filing of the bill; that the mortgagors had wholly neglected and failed to pay them, and that the same remained due and unpaid; that complainants have paid as taxes on said premises, \$182.05; that defendant, James M. Brown, is in possession of a portion of said premises as tenant of Ellen and Margaret Brown, who are also defendants, under a lease which will expire on March 1, 1885; that at the time of the execution of said note and mortgage the defendant, James Brown, was of sound mind and fully qualified to transact his own business; that the amount due on said note, reduced by payment to complainants by a subsequent grantee of the mortgagors of the price of a portion of said mortgaged premises, and which had been thereupon released from the lien of said mortgage, was \$12,636.98, for which sum said mortgage was a prior lien.

It then decrees that said mortgagors pay the same in twenty days, with lawful interest from the date of said decree, and \$182.05 for taxes advanced by complainants, with costs, including \$100 for solicitor's fees, and in default thereof, a sale and foreclosure in the usual form.

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The defendants, James Brown and Margaret Brown, who only sued out and prosecute this writ, assign the following as errors in these proceedings:

First. That the court rendered a decree against the defendant, James M. Brown, *pro confesso*, without jurisdiction of his person.

As to said defendant and some others, the return indorsed on the summons is as follows: "I have duly served the within named James M. Brown" and others named, "by leaving a true copy *thereof* for each," etc. Standing alone, this might be insufficient, as failing to show of what a true copy was so left. *Hochlander v. Hochlander*, 73 Ill. 618. But it immediately follows another as to still other defendants, which is: "Served *the within* by reading *the same* to the within named John L. Brown," etc. Taken together, then, the statements of the officer are that as to some of the defendants he served "the within" (writ) by reading "the same," etc., and as to others by leaving a true copy "thereof," which are plain and sufficient.

But if it were otherwise the error would be unavailing. In *Clark v. Marfield*, 77 Ill. 262, the Supreme Court said: "The only other ground for reversal insisted on, that need be noticed, is that the service on Simpson was not sufficient. He has not joined in this writ of error, and we are not aware that other parties can assign errors on his behalf that only affect him. *Hannas v. Hannas*, 110 Ill. 53. From the findings as to the interest of James M. Brown, it is clear that the decree against him could work no injury to plaintiffs in error.

Again, it is said, the court should have framed an issue at law upon the sanity of the mortgagor, James Brown, and submitted it to a jury for trial as was directed in *Myatt v. Walker*, 44 Ill. 485.

By the general law of chancery procedure a reference of the issue to a jury is imperative only in the cases of an heir at law, a rector or a vicar. *Daniell's Ch. Pr.* 1075. (Little, Brown & Co.'s edition of 1871.) Our statute has made another exception to the general rule in case of the contest of a will on the ground of insanity of the alleged testator. R. S.

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“Wills,” Sec. 7. With these exceptions such a reference is entirely in the discretion of the chancellor. R. S. “Chancery,” Sec. 40; *Milk v. Moore*, 39 Ill. 584; *Dowden v. Wilson*, 71 Ill. 485; *Meeker v. Meeker*, 75 Ill. 260; *Fanning v. Russell*, 94 Ill. 386; *Long v. Long*, 107 Ill. 210. Upon any issue where the facts are complicated, or the evidence voluminous, conflicting or doubtful, it may be advisable, as these cases fully show; and in this condition, upon an issue of sanity, its refusal may be regarded as such an abuse of the discretion given as to justify a reversal. *Myatt v. Walker*, 44 Ill. 485.

But the mere fact that the issue is upon the sanity of a party to the proceeding, or other person, however material, will not make such a reference imperative. *Hahn v. Huber*, 83 Ill. 244; also *Meeker v. Meeker*, 75 Ill. 260, and *Long v. Long*, 107 Ill. 210. And no such condition appears in the case at bar nor is it to be presumed in the absence of the evidence which it was the duty of plaintiffs in error, if dissatisfied with the findings, to preserve in the record. Where there is no bill of exceptions nor certificate of evidence the presumption will be that the findings of the decree were warranted by the proofs. *Hannas v. Hannas*, 110 Ill. 53; *Groendyke v. Copeen*, 109 Id. 334; *Davis v. Am. and Foreign Chr. Union*, 100 Ill. 313; *Sheen v. Hogan*, 86 Ill. 16; *Morgan v. Corlies*, 81 Ill. 72; *McIntosh v. Saunders*, 68 Ill. 128.

Lastly, it is claimed the allowance to complainants for moneys advanced to pay taxes on the mortgaged premises was erroneous, because no foundation for it was laid in the averments or prayer of the bill.

It appears that when the bill was filed they had not, in fact, advanced any moneys for that purpose, nor could certainly know they would. Hence it contained no allegation of such advance, nor prayer for any allowance on account thereof, or other specific relief in respect thereto. But it did set forth their right to such allowance upon the failure of the mortgagors to pay said taxes and their own advancement for that purpose, and that the mortgagors had so failed, and prayed, in addition to specific relief as to the mortgage debt proper and the solicitor's fee to which they were entitled for breach of

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the principal condition, "for such other and further relief in the premises as equity may require."

Then, upon due proof of such advancement by them and the amount thereof, equity and the express covenant in the mortgage required that they be reimbursed out of the proceeds of the sale of the mortgaged premises.

Thus, though the right to it was not absolute when the bill was filed, it was clearly contemplated upon two contingencies therein set forth, of which one was averred to have already happened and the other was manifestly but little less certain to follow before decree than was the interest to accrue upon the principal of the debt, and the decree found as a fact that it did so follow. We incline to think here was sufficient basis for the relief granted under the general prayer, without a supplemental bill. Certainly it is a different case from that of *DeLew v. Neeley*, 71 Ill. 473. The allowance was clearly just, and, technically considered, not so clearly erroneous as to require a reversal or modification of the decree.

Decree affirmed.

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WILLIAM L. SIMPSON ET AL., COMMISSIONERS OF HIGHWAYS OF FLAT BRANCH TOWNSHIP,

V.

JAMES B. WRIGHT AND SARAH L. WRIGHT.

Bill by Commissioners of Highways for Injunction to Prevent the Filling of Ditch—Easement—Parol License to Enter Premises of Another—Revocation—Statute of Frauds—Pleading—Parties.

1. A bill to enjoin the owner and occupant of premises adjoining a highway from filling up an artificial ditch thereon, and without the limits of the highway, does not lie, unless the public has by deed, prescription or condemnation acquired a right to the use of such ditch as an easement. And it is so held, although at the time of filing the bill the ditch had been in existence thirteen years, had been kept open by the Commissioners of Highways, and the occupant had been paid from public funds for improving it under a contract with the Commissioners.

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2. A parol license to enter upon or pass over the land of another is revocable at the pleasure of the licensor, and may be revoked by the appropriation of the land to any use inconsistent with the enjoyment of the license.

3. Under the rule that the averments of a bill, when equivocal, must be taken most strongly against the complainant, it must be presumed that the "contract" and the "mutual consent," referred to were merely verbal, and that the occupant had no title to the land or authority to impose upon it the burden of the easement claimed.

4. Such contract and consent, though in parol, were neither void nor voidable under the Statute of Frauds. They amounted merely to a license, which the bill itself shows to have been revoked.

[Opinion filed May 21, 1886.]

APPEAL from the Circuit Court of Shelby County; the Hon. J. J. PHILLIPS, Judge, presiding.

Mr. HOWLAND J. HAMLIN, for appellants.

The right to maintain this suit, and the ground upon which the relief sought to be granted, does not rest on the mere fact of the obstruction, but rests upon the rights secured to the complainants by virtue of the contract set out in the bill.

The complainants had acquired an easement across the lands of defendants for the purpose of draining these highways.

The only case that is almost entirely analogous to this is the case of *City of Coldwater v. Tucker*, 36 Mich. 437, in which an injunction was granted.

Equity will grant relief in suits of this character. *Green v. Oakes*, 17 Ill. 249; *Sanderlin v. Baxter*, 76 Va. 299.

It is claimed that the right of drainage, as set out in the bill, shows a mere license. Then there is jurisdiction in equity to protect the right. If it is mere license, in an action at law, the owner of the land may countermand it, but in equity it will be sustained where the owner has permitted money to be expended and work done. *Kerr on Injunctions*, Sec. 42, 46; *Devonshire v. Elgin*, 14 Beav. 530; *Legg v. Horn*, 45 Conn. 409.

The bill charges, upon information, that Sarah L. Wright claims to be the owner and asks that she disclose her rights. Under this form of allegation she could assert her right by answer, showing what her rights are, but that question can not be raised on this motion.

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Mr. ANTHONY THORNTON, for appellees.

The right claimed so far partakes of the character of lands, that it could only be acquired by grant or prescription which implies a previous grant. *Forbes v. Balenseifer*, 74 Ill. 183.

A parol license, even where valuable buildings have been erected, may be revoked at pleasure. *Woodward v. Seeley*, 11 Ill. 157.

Even the use of a right of way for twenty years will not make the right absolute. There must be peaceable enjoyment also for the time. *Kuhlman v. Hecht*, 77 Ill. 570; *C. & N. W. R. R. Co. v. Hoag*, 90 Ill. 344.

A party in possession has no right to make such a contract as is alleged in the bill. A trespasser, or a tenant, can not grant a valid easement over the land of another. *Gentleman v. Soule*, 32 Ill. 271.

To entitle one to a perpetual injunction to restrain the grading and improving of land, he must show that he is the owner of the land. Possession is not sufficient. *Gleason v. Jefferson*, 78 Ill. 399.

Commissioners of Highways have no authority in law to maintain this suit. They have only such powers as are expressly conferred by statute. *Brauns v. Peoria*, 82 Ill. 11; *Commissioners of Highways v. Newell*, 80 Ill. 587; *P., Ft. W. & C. R. R. Co. v. Reich*, 101 Ill. 157.

PLEASANTS, J. The bill filed by appellants sets forth upon information, that Sarah L. Wright claims to be the owner of the W. $\frac{1}{2}$, N. W. $\frac{1}{2}$ of section 33, in said town, but avers that James B. Wright, her husband, "is in possession, and controls and has for years controlled it;" that there is a highway commencing at the southwest corner of said section and running north on the section line clear through the township; that it passes over low, wet land between sections 32 and 33 and is often impassable at and near the place of beginning by reason of surface water accumulated thereon; that there is an open ditch commencing on the west side of said highway, which crosses it, and running thence northeasterly over said W. $\frac{1}{2}$, N. W. $\frac{1}{2}$ of section 33, and other tracts, besides two other

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highways described, discharges into Flat Branch Creek at a point in an east and west highway between sections 27 and 22.

It then avers that this ditch has been in existence thirteen years by mutual consent of the owners of the several tracts through which it passes, worked by the commissioners, kept open by public funds and used to drain the lands and highways mentioned; that being found insufficient for that purpose, complainants, on the 4th of April, 1885, "entered into a contract with James B. Wright" to widen and deepen it "through its entire length to be and remain an open ditch," for which they were to pay him in part, and the balance he was to raise from the land owners interested; that he proceeded to have the work done; that on June 5th complainants accepted it as completed, and paid therefor on the part of the town the sum of \$90, being something more than had been agreed on; that, as so enlarged, the ditch is sufficient to carry off all the water that comes onto said highways at the points where it crosses them, and that "by mutual consent and agreement it was to be an open ditch."

It then avers that on the 11th of September said James B. Wright threw up an embankment across it on the west end, about eight rods from where it commences, and is proceeding to fill it up on said W. $\frac{1}{4}$, N. W. $\frac{1}{4}$ —33, and threatens to place tile therein and to convert it from an open to a tile ditch; the effect of which, it is alleged, will be to cause the water to back up and lie on said highways, soaking the grades and rendering them impassable, and so working irreparable injury.

It therefore prays that defendants "be enjoined from filling up said ditch on the W. $\frac{1}{4}$, N. W. $\frac{1}{4}$ —33, and from throwing or erecting embankments across the same, and from placing tile therein * * * or in any manner interfering with or obstructing said ditch or the flow of water therein."

Upon this bill and the order of the master thereon, without notice, an injunction issued as was prayed. Defendants moved to dissolve it for want of equity and because there was no proper party complainant. The court sustained the motion, awarded to defendants \$100 for damages suggested, and

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dismissed the bill, which action complainants, who appealed, here assign for error.

We think the decree was right. The bill sought to perpetually enjoin the owner and the occupant of an eighty-acre tract adjoining a highway from filling up an artificial ditch on said tract and without the limits of the highway. *Prima facie* they had a right to fill it. Individuals may lawfully make such erections on their own land or otherwise use it as they see fit, provided they do not thereby infringe upon a public easement or the rights of other individuals. *Tanner v. Volentine*, 75 Ill. 625; *Nevins v. City of Peoria*, 41 Ill. 502; *The People v. The City of St. Louis et al.*, 5 Gilm. 351.

It is not pretended that this filling would directly obstruct the highway or flood it by diverting the flow of any natural watercourse or even the natural drainage of surface water. It would simply restore the natural surface of appellee's land which has been thus temporarily and artificially changed, and that this would obstruct the drainage of the highway, as previously affected by the ditch, is immaterial, unless the public have acquired a perpetual or continuing right to it. The bill claims they have; not that appellees are under obligation actively to keep it open and fit for that purpose, as in *Van Ohlen v. Van Ohlen*, 56 Ill. 528, but that the Commissioners of Highways as such have the right to do so, and that appellees are bound to refrain from any act that would obstruct it.

Such a right or privilege in the land of another amounts to an easement, and such as can be acquired at common law only by deed or prescription, (*Forbes v. Balenseifer*, 74 Ill. 183; *Kamphouse v. Gaffner*, 73 Ill. 453; *Woolward v. Seeley*, 11 Ill. 151,) or under the statute by condemnation, (R. S. 1883, Ch. 121, Sec. 8,) for the "consent" of the owner there spoken of, if to create an easement, must be understood to be such as would be effectual without the statute, that is, a common law consent, which is by deed.

But appellees set up no pretense of its acquisition by either of these means. They show a bare "consent" of the land owners without an intimation of its form or term, which is

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manifestly only a license up to April 4, 1885, and rely on the "contract" then made with James B. Wright for the enlargement of the ditch. In the argument it is said "the right to maintain this suit rests upon the rights secured to the complainants by virtue of the contract set up in the bill."

We do not perceive that this strengthens their case. They could have done the work specified under the license previously given until notified of its revocation. *Kamphouse v. Gaffner*, 73 Ill. 453; *Wilson v. Garrard*, 59 Ill. 51. Of course they could have had it done for them, and for that purpose could have employed the licensor himself as well as any other. But his agreement to do, for a consideration, what they were licensed to have done, could not of itself change the character or effect of the license. It would be a recognition of it and a consent to its continuance indefinitely, but leaves it subject to revocation precisely as before. Nor would the further facts of its execution and the payment of the consideration make any difference. *Kamphouse v. Gaffner*, 73 Ill. 453 *et seq.*, where the authorities are cited, and *Russell v. Hubbard*, 59 Ill. 335, is expressly declared to be "either limited to cases of party walls or considered as overruled." See also *Tanner v. Volentine*, 75 Ill. 624. The contract, then, to raise this license to the dignity of an easement must have shown such an intention and been by deed.

But it is not so alleged. By a familiar rule of pleading the averments in the bill, where equivocal, must be taken most strongly against the complainant. *Happy v. Morton*, 33 Ill. 398; *West v. Schnebley*, 54 Ill. 523; *Roby v. Cossit*, 78 Ill. 638; *Reipho v. Reipho*, 88 Ill. 438. And in *The People v. Swigert*, 107 Ill. 494, it was said: "Viewing them in that light, inasmuch as the relator does not claim that the direction * * * in question was in writing, it must be assumed it was a mere verbal order," etc. So here, inasmuch as the bill does not aver that the "contract" with Wright or the "mutual consent" referred to was in writing, it must be assumed they were verbal merely. And that, in effect, being all that is averred, is therefore all that is admitted in this regard by the motion to dissolve, operating as a demurrer. So much, how-

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ever, was thereby admitted; and because the contract and consent were so admitted as averred, and their full effect conceded, there was no need, as suggested by counsel, of a plea or answer setting up the Statute of Frauds. That statute, if invoked, would have furnished no aid, because the contract and consent, though in parol, were neither void nor voidable thereunder. But in their full effect they amounted only to a license, and that, the bill itself shows, had been revoked by the party who is alleged to have given it.

In *Van Ohlen v. Van Ohlen*, 56 Ill. 528, the contract was in writing, and did not purport to confer on plaintiff a right to enter upon defendant's land. The action was brought to recover damages for a breach of defendant's agreement to do something himself on his own land which would have been of benefit to the plaintiff. And in *The City of Coldwater v. Tucker*, cited by counsel from 36th Mich., as most nearly analogous to the case at bar, the contract was also in writing, and was not objected to for want of a seal. Besides, the injunction was proper in that case because under its peculiar circumstances the repudiation of the contract would have been a serious fraud upon the complainant, as well as an irreparable injury.

In this State, as we have seen, a parol license to enter upon or pass over the land of another is revocable at the pleasure of the licensor, and may be revoked by appropriating such land to any use inconsistent with the enjoyment of the license. That such an appropriation was made in this case is not only shown, but is the very subject-matter of the complaint.

Under the rule of pleading above stated, the bill is still more certainly and clearly defective in another particular. All the right claimed by complainants in the premises is said to be derived from James B. Wright, and yet it is not averred that he had any title to the land or any authority from the owner to put upon it the burden of this easement. The contrary is implied by something more than a mere omission, by the express but limited averments that he was in possession and control of it, and that another claimed to be the owner, whose claim is not denied, and who is actually made a party

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solely because of it. We think these, against the pleader, are to be taken as an averment that he was merely a tenant. In *Gentleman v. Soule*, 32 Ill. 279, the Supreme Court say: "It would be unheard of for a tenant to exercise the right of granting a valid easement over the land of another;" and to the same effect are *Harding v. Hale*, 83 Ill. 501; *Gridley v. Hopkins*, 84 Ill. 528; *Kyle v. The Town of Logan*, 87 Ill. 64.

Other questions have been argued—the sufficiency of the allegations of damage, the remedy at law, and the authority of Highway Commissioners to bring such a bill, which we think unnecessary to consider; but for the reasons above given the decree will be affirmed.

Decree affirmed.

CITY OF CARROLLTON
V.
GEORGE W. CLARK ET AL.

Cities—Mayor, a Member of the Council—Casting Vote of, on Passage of Ordinance.

1. The Mayor of a city, though not an Alderman, is a member of its Council, and as such is entitled to vote in case of a tie on the question of the passage of an ordinance.

2. An ordinance adopted by the casting vote of the Mayor, will sustain a prosecution for a violation of its provisions.

[Opinion filed May 21, 1886.]

APPEAL from the Circuit Court of Green County; the Hon. LYMAN LACEY, Judge, presiding.

Mr. E. A. DOOLITTLE, for appellant.

Mr. JAMES R. WARD, for appellees.

PLEASANTS, J. There is no question of fact in this case.

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Appellant is organized under the general law and has six Aldermen. Appellees were prosecuted for selling intoxicating liquor in violation of a supposed ordinance which was declared to be adopted by the casting vote of the Mayor. The record of the proceedings of the City Council upon its passage shows that the Aldermen were all present and voted by yeas and nays—"Alderman Carnody, Clark and Lyon voting aye, and Hazle, Sheedy and Johnson voting no," and "that this being a tie, Mayor Hassey voted aye and the ordinance was declared to be adopted."

On appeal the case was tried by the court without a jury, and upon the record referred to, which was in evidence, it was held the Mayor had no right to vote upon that question. The ordinance was excluded, and the issues found and judgment rendered for the defendants, to which rulings, finding and judgment plaintiff excepted and took this appeal.

That the supposed ordinance was duly published and that defendants had made four sales contrary to its provisions were admitted, and the only question is whether it was properly passed, or still more definitely, had the Mayor the right to give the casting vote on the question of its passage.

Section 6 of Art. II of the act (R. S. Ch. 24) provides that "the Mayor shall preside at all meetings of the City Council, but shall not vote except in case of a tie, when he shall give the casting vote," which would seem to be a clear answer and quite conclusive, unless the law has made some exception that embraces this case.

It is claimed that such an exception is made by Sec. 13 of Art. III, which declares that "the concurrence of a majority of all the members elected in the City Council shall be necessary to the passage of any ordinance."

To give this provision the effect of an exception it must be held that the Mayor is not a "member elected in the City Council" for such a purpose in such a case, and to establish that proposition reference is made to other sections and phrases in the act which seem to distinguish between legislative and executive functions, and between the Mayor and the City Council, and to use the terms "Aldermen" and "City Council" interchangeably.

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There can be no doubt that upon some subjects and questions the Aldermen only are entitled to vote in any contingency, nor that in general they only are to determine the action of the City Council as such, whenever the requisite number can concur to do it; nor is it claimed that the Mayor is an Alderman. He does not possess some powers given to them and does possess some not given to them. But how does it follow from all this that he can not be, for any purpose or in any contingency, "a member elected in the City Council?"

The position here taken by appellees is that he could not lawfully give the casting vote in question, not for the reason that although a member of the Council he was forbidden to vote in this particular case, but because only "members elected in the City Council" could lawfully vote upon it in any contingency, and he was not such a member.

Does not this argument prove too much? Is not the action of the City Council, as such, to be determined in all cases by the votes of its members only? And yet it is conceded that the Mayor may give the casting vote, in case of a tie, upon all questions before the Council except those specified in Sec. 13 of Art. III, which are "upon the passage of all ordinances, and on all propositions to create any liability against the city, or for the expenditure or appropriation of its money." The only reason suggested for making them exceptions is, that the vote upon them is absolutely required by the act to be taken by yeas and nays, and not upon any others unless at the request of a member. But this evidently is mainly for the purpose of making it appear whether the required majority of "all the members elected" do or do not concur, the emphasis being upon "all" and not upon "the members elected in the City Council."

We see nothing in that section to indicate that the right to vote is given more exclusively to members in these cases than in others. In those, the majority whose concurrence is required, may be a majority of a bare quorum—yet it must be a quorum of "the members elected in the City Council"—and if the Mayor's vote can break the tie and make a legal majority in one case, it must for the same reasons have the same power in the other.

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The question of his membership has the same bearing upon each. If he may give the casting vote in either, it must follow either that he is a "member elected in the City Council," for that purpose in that contingency, or that the action of the Council as such is determined by the vote of a person who is not a member of it; and if the latter, which would be anomalous, it must be by virtue of the power expressly given, and without regard to membership by the section above quoted, and which in its terms makes no distinction between a tie in the one case and a tie in the other.

As already observed, it is not claimed that the Mayor is an Alderman, but it is not perceived that he need be in order to be a member of the Council. It is true that he can not vote in any contingency upon a proposition to sell city or school property, or upon a reconsideration after a veto, or to expel a member, and perhaps in some other questions, but it is also true that under the express provision of the law there can not be a tie in these cases. Art. III, Secs. 7, 13 and 19. The right claimed for him in this regard is limited to giving the casting vote in case of a tie. If it requires membership, then membership for that purpose and to that extent is claimed.

The arguments against it from the provisions above referred to and from others in which "Aldermen" and "City Council" are used interchangeably, but only incidentally and loosely so, are quite inconclusive, if indeed, they really touch the question at all; and to our minds are refuted by the clear and deliberate declaration of the statute, that "the City Council shall consist of the Mayor and Aldermen." Art. III, Sec. 1.

No such language is to be found in the Constitution respecting the Lieutenant-Governor and Senators, and therefore the supposed analogy fails. This section simply places the Mayor and Aldermen in the same category as composing the City Council. If they are members of it, he is also; and his election in it or to it, though by a different constituency, is with a view to this fact.

For their respective functions in it we must look to others. Among those of the Mayor is that of giving the casting vote, in case of a tie, at all its meetings. It is not made to depend

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upon the nature of the question, but solely upon the fact of a tie. Both his membership and the substantial character of this function of it are recognized by the Supreme Court in *Winter v. Thistlewood*, 101 Ill. 450, where it is said that "except in a case of a tie in the votes of the Aldermen, when he is required to give the casting vote, his duties as a member of the Council are more formal than substantial."

We are of opinion that the casting vote in this case was lawfully given. The judgment of the Circuit Court is therefore reversed and the cause remanded for further proceedings in conformity herewith.

Reversed and remanded.

REUBEN C. BRADLEY AND JAMES H. SHORT

V.

THE PEOPLE OF THE STATE OF ILLINOIS.

Scire Facias on Recognizance—Pleading and Practice—Variance—Surplusage.

1. Upon a *scire facias* on recognizance it is *held*: That additional pleas setting up matters admissible under the plea of *nul tiel record*, or if not so admissible, fatal as admissions of the judgment without avoiding it, were properly overruled on demurrer; that an order striking one of two indictments for the same offense from the docket was not equivalent to a discontinuance of the other, and did not release the obligors; that there is no variance, although the recognizance was not "sealed," and although the judgment of forfeiture contained surplusage; and that the judgment, although not in the best form, awarded execution against the defendants severally.

2. A variance not specifically pointed out on the trial can not avail on appeal.

[Opinion filed May 21, 1887.]

APPEAL from the Circuit Court of Greene County; the Hon. LYMAN LACEY, Judge, presiding.

Mr. JAMES R. WARD, for appellants.

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The writ of *scire facias*, on a recognizance, stands in the place of both the summons and declaration in the case, and like the declaration in any other case, should contain every material allegation necessary to a recovery. *Thomas v. People*, 13 Ill. 696; *Lawrence v. People*, 17 Ill. 172; *Farris v. People*, 58 Ill. 26.

There is a variance between the recognizance set out in the *scire facias* and the one read in evidence, which, under the plea *nul tiel record*, is a fatal objection to the judgment in this case. *McFadden v. Fortier*, 20 Ill. 509; *Reese v. People*, 11 Ill. App. 346; *Chilton v. People*, 66 Ill. 501; *Matthews v. Storms*, 72 Ill. 316; *Smith v. Frazier*, 61 Ill. 164.

The records in evidence show that on September 5, 1884, the fourth day of the term, the court, on the State's Attorney's motion, by an order entered of record, struck this cause from the docket two days after the indictment was returned, without making any entry reserving jurisdiction of the person of the accused. The recognizers were entitled to reasonable notice after this event before they could be adjudged in default. *McKee v. Ludwig*, 30 Ill. 28; *Mattoon v. Hinckley*, 33 Ill. 208; *Kilian v. Clark*, 9 Ill. App. 426.

The court awarded execution for the amount of the recognizance and the costs, jointly against appellants; this was error, and the mere provision that the execution was to be satisfied by the payment of the same by either of the defendants did not obviate the error. *Briggs v. People*, 13 Ill. App. 172.

Mr. D. F. KING, for appellees.

It was sufficient to state the recognizance according to its operation and legal effect. *Lawrence v. People*, 17 Ill. 172; *Curry v. People*, 54 Ill. 263.

The legal effect of any recognizance is the same whether under seal or not, as no seal is required. *Slaten v. People*, 21 Ill. 28; R. S. 1874, Chap. 38, p. 396, Sec. 295.

It is not necessary for judgment to mention that it was joint and several. See approved form. *People v. Witt*, 19 Ill. 169.

Strict formality in a judgment of forfeiture is not required. *Weese v. People*, 19 Ill. 643.

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If the defendants were not injured by the form of the judgment of forfeiture, they have not right to complain. *Weese v. People*, 19 Ill. 643.

The court awarded execution severally, and the object is to have execution according to the form, force and effect of the recognizance. *Sans v. People*, 3 Gilm. 327; *Chunasero v. People*, 18 Ill. 405.

PLEASANTS, J. This was a *scire facias* against Joseph Bradley as principal and appellants as sureties on a recognizance taken August 9, 1884, by a Justice of the Peace, in the sum of one thousand dollars, and conditioned for the appearance of said principal at the September term next following of the Circuit Court of Greene County, to answer to an indictment for rape.

It recited that said cognizors "in writing by them duly signed and scaled, severally acknowledged themselves to owe," etc.; that the same was by said justice approved and filed in the office of the clerk of said Circuit Court; that on the third day of September, 1884, at the term aforesaid, an indictment was returned against said principal for said crime, and that afterward at the same term the defendants were severally called and defaulted, "whereupon it was considered and adjudged by the said court that the said recognizance be taken for and declared forfeited, and that a *scire facias* issue," etc.

Appellants filed, among others not necessary to be noticed, three pleas, in substance respectively as follows:

1. That there is not any record of said supposed forfeiture.

2. That they produced the body of their principal in open court at said term on the first and subsequent days thereof, and before any forfeiture was declared, and were, by the order of said court, released from further performance of the conditions of said recognizance.

3. That said principal personally appeared in said court on the first day of said term, and from day to day thereof; that on the fifth day of September, in said term, the said court, in a

certain cause then pending, in which said recognizance was filed and a part of the records thereof, and being the same to which he was thereby bound to appear, made an order of record that "this cause be and the same is now stricken from the docket, and the defendant is' thereby discharged henceforth and permitted to go without day," and that said cause was so off the docket when the supposed forfeiture was declared.

Of these the second and third were held bad on demurrer, and the issue joined on the first was tried by the court without a jury and found for the plaintiffs, whereupon, after default taken against said Joseph Bradley, judgment of execution was entered against all the defendants.

Appellants claim there was error in sustaining the demurrers to said second and third pleas.

To maintain the issue on the first it was incumbent upon plaintiffs to show a judgment of forfeiture in full force, and therefore competent for defendants to rebut it by producing a record of any other proceeding which made it void when entered or inoperative afterward. If such was not the legal effect of the order referred to in these pleas, they were bad for that reason, because they admitted the judgment; if it was, they were useless, because it was just as admissible and effectual under that of *nul tiel record*. And it was in fact so treated. The error, therefore, if any, did not prejudice the defendants and is no ground for reversal. *Addems v. Suver*, 89 Ill. 482; *Cooke v. Preble*, 80 Ill. 381.

But there was no error here. In the Circuit Court, at its September term, 1884, there was but one case of the People against Joseph Bradley for rape. The docket, however, indicated two, numbered, respectively, 59 and 62. The entry of the first was made upon the filing of the recognizance and accompanying papers by the justice, August 9th; of the other, upon the return of the indictment, September 3d. One of them was manifestly superfluous, since all the papers so filed pertained to the same case, and since that was the case upon the indictment which was docketed as No. 62, and no action was to be taken in No. 59 separately, it was by the court, on

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the 5th, simply and properly therein "ordered that this cause be stricken from the docket."

Counsel now insists that this order, being presumably made with the approval of the State's Attorney, "was equivalent to a discontinuance" of the cause upon the indictment, but that he well knew, at the time, it was not so intended by the court or the State's Attorney, nor so understood by anybody concerned, is clear from the record, which shows that on the 10th, five days after its entry, he entered a motion in No. 62 on behalf of the defendant for a continuance. Whether as a consequence of the afterthought now urged or not, this motion was withdrawn on the 11th, on which day the defendant failed to appear and the recognizance was therefore declared forfeited.

The court below having judicial knowledge of these facts from the records and proceedings in this case, made and had before these pleas were filed, rightly held as matter of law that this order therein referred to did not release the defendants.

On the trial of the issue joined, they objected to the recognizance offered, which was not in fact "sealed" as alleged "for the reasons that it was several and variant, and did not sustain the allegations," and its admission over such objection is assigned for error. There was no plea traversing the alleged record of the recognizance; it was in fact several as averred. The *scire facias* purported to set it out only according to its legal effect, and this was not varied by the want of a seal for none was required. R. S. 1874, Crim. Code, Sec. 295. And if the averment was matter of essential description, the variance in question could not avail appellants here because it was not specifically pointed out on the trial. In *St. Clair Co. Ben. Soc. v. Fietsam*, 97 Ill. 480, the rule and the reason for it are thus declared: "It is a sufficient answer to say, no variance between the proof and the declaration in this respect was called to the attention of the court when the instrument sued on was offered in evidence. A general objection was taken—there was a variance. That is not sufficient. The party objecting should have pointed out wherein the variance existed. Had that been done, under our Practice Act an amendment could have been instantly made that would have obviated the ob-

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jection, so that the trial could have proceeded on such terms as the court might have seen fit to impose."

It is also claimed there is a fatal variance between the recognizance and the judgment of forfeiture.

The record introduced, after showing that the principal and sureties were severally called and defaulted, proceeds as follows: "Thereupon it is considered by the court, that the recognizance of the said Joseph Bradley, principal, and Reuben C. Bradley and James H. Short, his sureties, herein heretofore taken, and by them jointly and severally entered into, and for which they were jointly and severally bound, be taken, held and declared as forfeited. Therefore it is considered by the court now here, that the People of the State of Illinois have and recover of the said Joseph Bradley, principal, and Reuben C. Bradley and James H. Short, his sureties in the recognizance herein, the sum of one thousand dollars, the amount of the said recognizance as aforesaid. And it is further ordered by the court that a writ of *scire facias* issue herein," etc.

We have seen that the recognizance was not joint and several, but several only, as was averred in the *scire facias*. Also that the judgment was therein set out as a simple judgment of forfeiture, "that the said recognizance be taken for and declared forfeited." There is no variance, then, between the allegation and the proof as to the judgment. It is certainly a judgment of forfeiture, and the recognizance adjudged forfeited is identified by the several particulars stated, and beyond doubt by its designation as "the recognizance herein." This was enough to entitle the people to final judgment in this suit for execution, according to the actual form, force and effect of the recognizance. The People v. Witt, 19 Ill. 171.

What if the court did go further and erroneously characterize it as joint and several? That was in excess of what the statute or good practice required. Landis v. The People, 39 Ill. 79; Weese v. The People, 19 Ill. 643; Passfield v. The People, 3 Gilm. 406; Briggs v. The People, 13 Ill. App. 172. It was corrected by the recognizance itself, which was by reference made a part of the judgment. Where a declaration on an appeal bond wrongly described it as payable on demand,

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but a further description showed it payable on affirmance of the judgment appealed from, the Supreme Court said: "We think there was no substantial variance. The mere statement that the obligation was payable on demand was clearly inconsistent with the full description of it in the declaration, and might well be disregarded as surplusage." *Walker v. Welch*, 14 Ill. 277; see also *Benedict v. Dillehunt*, 3 Scam. 287. In this case all that followed the declaration of forfeiture might well be so regarded. It did the defendants no harm, and the whole was "in effect," as was held in a like case, "only a judgment of forfeiture." *Weese v. The People*, 19 Ill. 647-8.

Lastly, it is said that the final judgment awarded execution against the defendants jointly. It appears from the bill of exceptions that the court "ordered executions severally against the defendants, for the plaintiffs, for the amount of said recognizance and the costs." As entered up by the clerk the judgment is "that the People of the State of Illinois have execution against Joseph Bradley, principal, for the sum of one thousand dollars, the penalty in the said recognizance mentioned, and against James H. Short and Reuben C. Bradley, sureties in the said recognizance, for the sum of one thousand dollars each, together with the costs in this behalf expended; said executions to be satisfied by the payment by either or any of the said defendants, of the sum of one thousand dollars aforesaid."

Although as a form for such a case this might be improved, we think it awarded execution severally, according to the form, force and effect of the recognizance.

Perceiving no error in the record, the judgment of the Circuit Court will be affirmed.

Judgment affirmed.

Herkimer v. Shea.

JACOB D. HERKIMER

V.

NORA SHEA.

Injury to Personal Effects of Servant—Excessive Damages—Abusive Language of Counsel Condemned.

1. In an action by a servant girl, to recover damages for an injury to her personal effects, resulting from the placing of them in the street by the defendant, whose services she had left under circumstances of great provocation, it is held that a verdict for thirteen times their value is excessive.

2. This court strongly condemns the conduct of counsel for plaintiff in the trial court, in the use of extremely abusive language in speaking of the defendant, much of such language referring to irrelevant matters.

[Opinion filed May 21, 1886.]

APPEAL from the County Court of Coles County; the Hon. CHARLES BENNETT, Judge, presiding.

Messrs. CRAIG & CRAIG, for appellant.

Mr. I. McGRATH, for appellee.

PLEASANTS, J. This suit was commenced before a Justice of the Peace by appellee against appellant for injury to her trunk and hat, which together and including two plumes, cost, when new, \$16.40. On the trial in the County Court, upon appeal, she got a verdict and judgment for \$200.

It appears that being at service in defendant's family at Mattoon, in the afternoon, at the close of the first week, she and the other hired girl changed their dresses, and went to the room of his wife, to whom plaintiff abruptly said, "Please, we want our wages; we wish to quit."

To be left, as she was—in delicate health, with a large house, entirely without help, by a concerted movement and without a moment's notice—was certainly somewhat provoking.

Mrs. Herkimer called her husband, who, on being made

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acquainted with the situation, after ordering them to go to the kitchen, inquired of plaintiff the amount of her wages, and on being answered "four dollars," said she was a liar and asked his wife. She in turn asked plaintiff, "when did you come?" and the reply was she "didn't know the hour nor the minute," which seemed to strike him—not without reason—as impertinent, and he said angrily, "Answer my wife, answer my wife," snapping his fingers in her face and threatening to slap her. After some further words about a broken dish plate, in which he called both the girls liars and cursed them, he paid them their wages and told them to get out of the house or he would kick them out.

It then occurred to plaintiff, that though she had dressed to leave, herself, she had not arranged for the removal of her things, and so was under a necessity to ask a favor where she had shown no disposition to grant any. If he had discharged her without warning, she would have been entitled to a reasonable time in which to remove them. But having left of her own will, against his, and without giving him notice or opportunity to supply her place, she had no just claim upon his indulgence. When she spoke to him about leaving them until she could send for them, his answer again was: "Get out of my house or I'll kick you out," which could hardly be construed as consent, express or implied. The instruction given to the jury on that theory was without foundation in the evidence.

Nor would the law allow anything for their convenience in that behalf. Having determined to go herself, in the manner stated, she should have been prepared to take them with her. She was not so prepared and did not take them. He would therefore have been justified in removing them himself, without delay, being liable of course, if he undertook to do so, to make compensation for any injury to them through gross carelessness in handling or exposing them, and for malice or wantonness in inflicting it—to punitive damages besides.

He waited, however, until some time in the forenoon of the next day, when he and his son carried them without damage into the yard, and on returning from his farm in the evening,

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and finding them still there, he set them in the street just off the sidewalk and close to the hitching post. The only witness who testified to this, except the defendant himself, says she "saw him take the trunk out of the yard. He had hold of one end of it, and dragged it out into the highway with one end on the ground. He threw down the end that he had up in a very savage manner. He pitched the bandbox out onto the trunk and it fell off. He went and got it and set it on the trunk and put out some other things that were in a sack." The witness informed a neighbor, who soon after took them to his house, where it was found the trunk was considerably broken, the lid of the bandbox off and the hat so crushed as to be of little if any value. Plaintiff testifies she left them all in good condition. When or how the damage was done, further than as above stated, was not shown.

This was the case for the plaintiff in all its extent. The injury sued for was to her property only, measurable in money and not exceeding \$15, committed by a man of quick and ill-governed temper, already heated by her leaving his service as she did, and then suddenly inflamed by the sight of her things still on his premises. She and her advisers seem to have thought it could be fully redressed by a Justice of the Peace, and it is really straining to make a great matter of it. Had it been properly presented upon its merits alone, we should have hesitated to sustain the verdict.

But it was not. In his opening statement her attorney told the jury, "Old Jake Herkimer was rich, and meaner than he was rich; that he would get poor people to work for him, and never pay them; that the court dockets were loaded down with suits against him by poor people for the damnable outrages he had perpetrated," and in the closing argument, that "he was a robber, that he was no gentleman, that he was a rich man, and the meanest man in Coles County;" and even when admonished by the court, that "he would not take back anything he had said."

It is true appellant, when on the witness stand, used some very reprehensible language—but it was all in his cross-examination—to counsel who had thus characterized him, and who

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has called our attention to it by an additional abstract, which, however, omits what was the beginning if not the cause of the discreditable exhibition. The record shows that after he had stated how he carried the trunk out the subject was pursued as follows: "Q. You let it down carefully? A. Yes. Q. Gently? A. Yes. Q. Were you afraid of breaking the paving stones?"

In the argument filed here counsel "admit that Herkimer was denounced in no mild terms," and say they "were but poorly able to command such language as was required by the exigencies of the case."

We are in much the same condition with reference to the manner of trying any case in a court of justice; but would be understood to condemn it in terms as strong as the proprieties of the bench would allow. *Hennies v. Vogel*, 87 Ill. 242; *Fox v. People*, 95 Ill. 71; *Duffin v. People*, 107 Ill. 113; *City of Elgin v. Eaton*, 2 Ill. App. 93.

From the verdict here rendered it may be presumed it was effective. Assuming that something could be properly awarded by way of punishment to the defendant for his conduct in this case, but nothing for loading down dockets, outrages upon the poor in general, or other irrelevant meanness, we think thirteen times the value of the property injured, reaching the limit of the jurisdiction, was clearly excessive, and must have been due, in part, at least, to prejudice and passion, which these means were so well adapted to arouse.

The judgment will therefore be reversed and the cause remanded.

Reversed and remanded.

DeLand v. Metzger.

JAMES DELAND ET AL.

V.

WILLIAM METZGER.

*Foreclosure of Mortgage—Note by Guardian Payable to his Successor—
Failure of Consideration—Delivery in Escrow.*

Upon a bill filed to foreclose a mortgage, given to secure a note made by the guardian of a minor and payable to his successor on a promise by the latter to credit the guardianship account of the maker, and to procure an order from the County Court to that effect, it is *held*: That an answer setting up said promise, a failure of performance, and the pendency of a suit against the maker for the entire balance of said guardianship account, was pertinent; that the promise of the payee did not bind him personally or as guardian, and that the note was either without consideration, or was given upon a consideration which has wholly failed.

[Opinion filed May 25, 1886.]

APPEAL from the Circuit Court of DeWitt County; the Hon. CYRUS EPLER, Judge, presiding.

Messrs. MOORE & WARNER, for appellants.

The want or failure of consideration is a good defense to an action to foreclose a mortgage. *Weaver v. Wilson*, 48 Ill. 125; *Wears v. Pierce*, 24 Pick. 141; *Hannah v. Hannah*, 123 Mass. 441; *Jones on Mortgages*, Secs. 610, 612, 1297 and 1490, and cases cited.

A guardian can only compound a claim with the approbation of the Probate Court. Ch. 64, Sec. 17, R. S.; *Sperry v. Fanning*, 80 Ill. 371; *McIntyre v. People*, 103 Ill. 142.

Mr. RICHARD A. LEMON, for appellee.

PLEASANTS, J. This was a bill filed by appellee against appellants and others to foreclose a mortgage executed May 29, 1883, by James DeLand and Mary, his wife, to secure a note of said James, of the same date, for \$4,492.79, payable to

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"William Metzger, guardian of F. H. Magill," or order, on or before two years from date, with interest at six per cent. Appellant Emma L. Magill was a junior mortgagee.

Appellants filed a joint and several answer, averring that on the 28th of May, 1883, complainant was by the County Court of De Witt County appointed guardian of Frederick A. Magill, to succeed respondent, James DeLand, who had been his guardian for many years, and as such was then indebted to his said ward for money received in excess of what he had paid out in about the sum of \$16,000; that being unable to pay the same or any part thereof to his successor, the latter "promised the defendants, James DeLand and Mary DeLand, that if the defendant, James DeLand, would turn over to him, the complainant, a large amount of notes and mortgages then owned and held by the defendant, James DeLand, of the value of about four thousand dollars, and make and deliver to the complainant the note in said bill described, and the defendant James DeLand, and Mary DeLand, his wife, would make, execute and deliver to the complainant the mortgage mentioned in said bill, the defendant Mary DeLand, releasing her homestead and dower interests in and by said mortgage to the lands therein described, he, the complainant, would receive and accept such notes and mortgages and the note and mortgage in said bill mentioned, at their face value, principal and interest, to wit: \$8,992.79, as so much cash, credit the defendant James DeLand therewith on account of his said guardianship, and procure an order of said County Court to that effect, and that in consideration thereof, and for no other consideration whatever," the notes and mortgages first mentioned were delivered and the note and mortgage in said bill described were executed to said complainant.

It then avers that complainant has not so credited said James DeLand with said amount, or any other amount, nor procured an allowance of the same by said County Court, but to the contrary thereof obtained an order of said court upon said defendant to pay over the whole of said sum of \$16,000 to complainant, and also brought a suit in the Circuit Court for said county against said defendant and his sureties on his

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guardian's bond for the whole of said sum and interest thereon from the date of said order of payment, which suit is still pending; that he refuses to allow said defendant and his sureties any credit in said suit on account of said notes and mortgages, which he still holds and retains, as it alleges he procured them, for the purpose of defrauding respondents and each of them.

To all of this matter, exception for impertinence was sustained, and respondents, declining to make further answer pursuant to the rule entered thereon, were defaulted, and the bill taken *pro confesso*, on which, and the master's report of proofs and computation of the amount due, the court entered a final decree of foreclosure and sale in the usual form. The respondents appealed.

Since everything in the answer, aside from a general denial of the indebtedness to complainant as alleged, and of his right to the relief sought, which are conclusions only, was embraced in the exception, we see no irregularity in requiring a further answer, and taking the bill as confessed for want of it. Practically, the case was disposed of on bill and answer, and the question now is whether the answer was pertinent and sufficient, which depends upon the construction of the agreement therein set forth.

DeLand was bound to pay over the balance chargeable against him in money. R. S. Ch. 64, Sec. 157. Appellee, as guardian in succession, was not merely unauthorized, but substantially forbidden to accept anything in lieu of it without the approbation of the County Court. R. S. Ch. 64, Sec. 17. A promise to do so would therefore have been void or at least ineffectual. That both the parties knew this, is evident from the further promise to obtain a proper order of said court therefor. They must also have known, for it amounts to the same thing, that he could no more bind himself as guardian—that is, his ward's estate—to obtain such an order, than to accept the securities at their face value without it.

It can not then be supposed that an absolute promise to that effect was intended or understood to be made by him as guard-

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ian or otherwise, for there is nothing in the answer to indicate that he said or did anything in the premises otherwise than as guardian, and the statement of his promise is to be construed in that view. While in some cases an absolute agreement so made, but which could not be so enforced from mere want of authority to make it, might bind him personally, the point here is that in this case he did not make such an agreement as guardian, and the inference from that, and the further fact that he acted throughout only as guardian, is that he did not make it at all.

It is to be considered also that there was no consideration of personal advantage to him for such a promise, and that in the nature of the case performance was not certainly possible by any means he could use. It would have been unreasonable to take the risk of damages for a failure without fault, unless for some corresponding benefit in the event of success, and even then, in a case like this, it would have been but little better than a gambling transaction.

So that although the terms employed to state it in the answer may of themselves import an absolute promise, for the reasons above given, and in the light of the circumstances set forth, we incline to think it was really only conditional in substance; that if appellee should not obtain the order of approval mentioned, the note and mortgage in question should be of no effect. That would have been lawful and reasonable, and substantially such as is alleged.

But if this be not a sound construction, we are clearly of opinion that the immediate and moving consideration for the execution of the note and mortgage was the credit to be actually and effectually given upon DeLand's indebtedness as guardian, and not appellee's promise in respect to it.

In either view the answer was pertinent. If the mortgage may not be regarded in equity as having been delivered in escrow to appellee in his individual capacity, for him as guardian, upon performance of the condition, it was upon a consideration which has wholly failed.

The decree is therefore reversed and the cause remanded for further proceedings in conformity with this opinion.

Reversed and remanded.

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CITY OF SPRINGFIELD
V.
BENJAMIN M. GRIFFITH.

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*Municipal Corporations—Change of Street Grade—Damage to Lot—
Damnum Absque Injuria—Variance between Declaration and Proof.*

1. In an action to recover damages alleged to have resulted from the raising of the street grade in front of plaintiff's lot, it is *held*: That the expense of filling up the lot to make it conform to the new street level can not be recovered as damages; that there can be no recovery for obstructing the flow of surface water from said lot, because damages therefor were not claimed in the declaration; and that there should have been no allowance for the appearance merely of the plaintiff's house, unless caused by the elevation of the street as distinguished from the filling up of the lot.

2. It *seems* that in such cases there can be no recovery for depreciation by effect upon appearance merely because of changes wholly external to the premises.

[Opinion filed May 25, 1886.]

APPEAL from the Circuit Court of Sangamon County; the Hon. J. A. CREIGHTON, Judge, presiding.

Messrs. GREENE, BURNETT & HUMPHREY and JOSEPH M. GROUT, for appellant.

A city may lower or elevate the grades of its streets at its pleasure, when it is done in good faith, with a view to fit them for use as streets, to meet the public wants, and can not be made liable for the inconvenience and expenses of adjusting the adjacent property to the grade of the street as improved. *Nevins v. Peoria*, 41 Ill. 502; *Shawneetown v. Mason*, 82 Ill. 337; *Rigney v. Chicago*, 102 Ill. 64, reviewing authorities. The presumption is that those who purchase lots upon streets calculate the chances of such elevating or lowering of the grade of the streets as the increase of population of the city may require, in order to make the passage to or from the several parts safe and convenient; and as their purchases are always voluntary, they may indemnify themselves in the price

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of the lots which they buy, or take the chance of future improvements, as they shall see fit. *Shawneetown v. Mason*, 82 Ill. 337; *Callender v. Marsh*, 1 Pickering, 418.

Messrs. PATTON & HAMILTON, for appellee.

PLEASANTS, J. Case by appellee, for damages to his residence property on Sixth Street, in the City of Springfield, alleged to have been caused by raising the grade of said street in front of it.

The ways and particulars in which it is claimed to have been thereby done, are set forth in several counts, respectively as follows:

1. By destroying the easy and inviting access to and from said street and the plaintiff's premises.
2. By putting him to expense for raising his lots to make them conform to the grades of said street so raised.
3. By putting him to expense for raising his lots to protect them from the overflow of water accumulating on said street so raised.
4. Same in substance as the third.
5. By causing the water accumulating on said street to flow upon said premises and into the dwelling house and cellar thereof.
6. Generally, that defendant wrongfully raised the grade of said street and thereby damaged and depreciated the value of said lots.

Appellee's lot is on the east side of the street, fronting west, and sixty-five feet in width. His house, which is a story and a half high, and of brick, is eight or ten feet from the south line and fifteen from the north, and the porch is fourteen from the front fence. It was built on a ridge higher than the street and running diagonally southeast and northwest, the summit of which at the north line was ten or twelve feet from said fence and at the south about thirty-two; so that surface water falling on the lot west of the line between these points formerly flowed west over the sidewalk into the street. This flow was arrested at the sidewalk by the raising of the

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grade about eleven inches; and to prevent the consequent formation of a pond in his front yard and the flooding of his cellar he says he was compelled to fill up his lot on the front. He did fill it on the north part up to the surface of the raised sidewalk, which gave a fall of two and a half inches from the house to the street, but not so high on the south part, from which he carried the water by tile laid from his southwest corner back to a sewer in the alley.

This work, including the taking up and relaying of stone and brick walks, cost him \$280. But this was only a choice of evils, for the filling itself necessarily lessened the value of the property in various ways, nearly stopping his ventilating windows, dampening the floor and walls, injuring the plaster, paper and paint, etc. The most serious effect, according to the evidence, is from the change of elevation. The porch, which was before fourteen inches above ground, is now only four or five, and the general appearance is squatty and unwholesome. He thinks the depreciation is from \$2,500 to \$3,000. Other witnesses corroborate him as to the particular facts, and substantially as to his estimate of the damages, the lowest being not less than \$1,000, the amount found by the verdict, on which the court, after overruling a motion for a new trial, rendered judgment.

From the foregoing statement, which is in substance that of appellee himself, it appears that all his damage is in the cost of filling and tiling his lot, and the effect of it upon the market value of the premises.

Did the effect of the city's action as averred compel or justify this filling, so as to make it legally liable for all this damage?

It can not be claimed, upon the evidence, that the access to and from the street, as is averred in the first count of the declaration, or the easy and inviting character of it, as may have been intended, was destroyed by the raising of the street grade to the height of eleven inches. Its impairment was hardly sufficient to be of itself a cause of action; certainly not to compel or justify the filling of the lot as a remedy; nor was restoration of the lost conformity to grade as

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averred in the second count, for such conformity for its own sake, which is all that is here averred, is purely a matter of taste and choice. This count therefore states only a voluntary expenditure for the gratification of fancy, which is not a cause of action.

The real, if not the sole cause, is stated in the third, fourth, and fifth counts, which are substantially the same, namely: that the direct and necessary effect of raising the street grade was to cause the water, accumulating on the street, to flow as it had not been used to flow, to and upon the plaintiff's premises, and that to protect them from such overflow he was compelled to fill and raise them as he did.

But this statement is not shown to be true, and is shown to be not true. Upon this point there is no conflict of evidence. The street-curbing contained all the water that accumulated on the street, and the sidewalk sloped from appellee's fence to the curb. The water that troubled him was what fell wholly on his own premises. His case against the city, therefore, if any he has, is for obstructing and preventing its flow therefrom, by raising the street grade and neglecting to provide suitable culverts. But such is not the case stated, nor the damage claimed by the declaration. He was entitled to recover only for what was both claimed and proved. The first instruction for plaintiff allowed the jury too great latitude in this respect. We apprehend they awarded upon this evidence all they would have awarded upon proof that the filling was necessary to keep off the water from the street.

Nor are we satisfied with the allowance of damages for any effect upon the appearance, merely, of appellee's building, except such as was caused by some change in the premises. How much was allowed for squattiness, and how far that was due to the elevation of the street, apart from or in addition to the filling of the lot, is entirely uncertain; yet from the evidence it may be fairly presumed that some of this effect was so caused, and that this element of damage entered into the finding. Thus, the witness Knickerbocker was asked, "What difference, if any, in the appearance of the house, was made by the change in filling up the street?" to which objection was

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made, but overruled, and he answered: "It looks squatty and low; lower even than the street. Anybody, to look at it, would naturally think the first floor was about even with the sidewalk. Before, it had a very good appearance—set up so." He further said, "I would not consider the house of any value after the grade was raised;" and Mr. Cullom says, "It lowered the house by comparison with the street." The depreciation by effect, upon appearance merely, of changes wholly external to the premises, must be to a large extent matter of taste and fancy; but if it could be shown by reliable testimony, we think it would be *damnum absque injuria*, and this evidence was improperly admitted. Individuals owning adjoining lots would not be so restricted in respect to their improvement, and we see no reason why the city should be in respect to its streets.

On the whole, we are satisfied this verdict, as to a large portion of the damages found, is unsupported by competent evidence, and that the court erred in the particulars mentioned which contributed to the result. The judgment will therefore be reversed and the cause remanded.

Reversed and remanded.

STARNE, DRESSER & COMPANY

V.

WILLIAM SCHLOTHANE.

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Injury to Laborer in Coal Mine—Co-Servants—Contributory Negligence.

1. The engineer of a coal mine, whose duty it is to lower and raise the cages used in the operation of the mine, and a common laborer, whose duty it is to prepare the bottom of the shaft to receive the cages, are co-servants; and the owners of the mine are not liable for damages resulting to the latter through the negligence of the former.

2. In the case presented, upon a review of the facts, this court holds that a laborer so employed can not recover for injuries sustained in the course of his employment, especially as he appears to have contributed to

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the negligence, if any, and although directed to continue at work by another servant of the owners.

[Opinion filed May 25, 1886.]

APPEAL from the Circuit Court of Sangamon County; the Hon. J. A. CREIGHTON, Judge, presiding.

Messrs. PATTON & HAMILTON, for appellants.

Wadsworth and appellee were fellow-servants, and appellants can not be held responsible for any act of either, affecting the safety of the other. C. & N. W. R. R. Co. v. Moranda, 93 Ill. 302; Same v. Same, 108 Ill. 576; C. & E. I. R. R. Co. v. Geary, 110 Ill. 383; Abend v. T. H. & I. R. R. Co., 111 Ill. 202.

There are a number of earlier cases in which the Supreme Court has held that no recovery could be had, because the person injured and the one whose negligence caused the injury were fellow-servants.

In Honner v. I. C. R. R. Co., 15 Ill. 500, the injury was caused by the negligence of co-servants in adjusting a turntable. In I. C. R. R. Co. v. Cox, 21 Ill. 23, the negligence of the conductor and engineer of a wood train caused the injury to a laborer on the train. The case of C. & A. R. R. Co. v. Keefe, 47 Ill. 108, is similar in its facts to the Cox case. In C. & A. R. R. Co. v. Murphy, 53 Ill. 336, a laborer was hurt through the negligence of the engineer of a switch-engine. In Gartland v. T., W. & W. R. R. Co., 67 Ill. 498, the injury was the result of the negligence of co-servants in moving cars. In St. L. & S. E. R. R. Co. v. Britz, 72 Ill. 256, the man injured was a shoveler employed on a construction train, who was hurt through the negligence of the engineer or brakeman. In I. C. R. R. Co. v. Keen, 72 Ill. 512, the plaintiff's intestate, who was a brakeman on a water train, was killed by the explosion of the boiler of the engine drawing the train, caused by the carelessness of the engineer. In T., W. & W. R. R. Co. v. Durkin, 76 Ill. 395, the death of plaintiff's intestate, who was a laborer on a gravel train, was caused by the negligence of the engineer of the train. In C. & A.

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R. R. Co. v. Rush, 84 Ill. 571, the injured person was a brakeman, and the accident was, in part, the result of the carelessness of the engineer, who so suddenly started the train that Rush was thrown under it. In Valtez v. O. & M. R. R. Co., 85 Ill. 500, a car repairer at a station was injured by the negligence of the engineer of a switch engine.

A master is not liable for an injury sustained by one of his employes through the negligence of the foreman having charge and control of him and others, unless the foreman had power to discharge employes, or the master was negligent in employing him. Peterson v. Whitebreast Coal Co., 50 Iowa, 673; Keystone Bridge Co. v. Newberry, 96 Pa. St. 246; Lehigh Valley Coal Co. v. Jones, 5 Norris, 433; D. & H. Canal Co. v. Carroll, 8 Norris, 374.

When the service undertaken is extra hazardous, and the employe having knowledge of its character, continues in it, he can not maintain an action for injuries received while in the performance of the labor. Or if he discovers that the service has become more hazardous than usual, or than he anticipated, the rule is, he must quit the service or assume the extra risk to which he is exposed. The master is under no obligation to take more care of the servant than the servant is willing to observe for his own personal safety. I. B. & W. R. R. Co. v. Flanigan, 77 Ill. 365; Pennsylvania Co. v. Lynch, 90 Ill. 333; Missouri Furnace Co. v. Abend, 107 Ill. 44; Simmons v. C. & T. R. R. Co., 110 Ill. 340; Abend v. T. H. & I. R. R. Co., 111 Ill. 202.

Messrs. McCLEARNAND & KEYS and N. M. BROADWELL, for appellee.

The law holds appellants to the exercise of the highest degree of care and caution. But they were grossly negligent.

They permitted the cages to be lowered and hoisted without signal or warning of any kind. At the bottom of the shaft, where every few minutes one of the cages would land, there was no railing or other structure to protect the man from injury by the cage, who might come to the bottom of the shaft.

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It was negligence on the part of the appellants to require the service of appellee of dipping the water from the pump when the cages were in operation. It was their duty to provide such means and appliances as would reasonably insure the employe against injury while engaged in his work. There was an easier and safer way of removing the water from the sump than by having the appellee dip the water therefrom, and that was by lifting the same by a pump.

Appellee was hurt because the cage suddenly and rapidly descended upon him without warning or signal of any kind; because the appellants required the particular service of appellee when the cages were in operation; because appellants did not provide proper means and appliances to protect appellee from injury while engaged in his work; because the pump was out of repair and not working, and because appellants negligently permitted the steam to escape into the shaft at the bottom thereof, so as to prevent appellee from either seeing or hearing the approach of the cage.

Appellee and Wadsworth did not co-operate in the performance of their duties. The dipping of the water by appellee had no possible connection with Wadsworth acting as superintendent or trackman.

Where a person in the employ of another is commanded by a fellow-servant, but to whom he is so subordinate that he is compelled to obey his direction, to do an act in the same general service and extra hazardous in its character, and in doing the same the servant so directed receives injuries, occasioned by the negligence of another servant employed in the particular line of service in which the act was being done, the common employer will be liable to the servant so injured. *Lalor v. C., B. & Q. R. R. Co.*, 52 Ill. 401.

PLEASANTS, J. The declaration in this case sets forth that defendants, the appellants, owned a coal mine more than 200 feet below the surface of the earth, and operated the same through a shaft with heavy cages lowered and hoisted by steam power, and that plaintiff was employed at common labor about the bottom of said shaft. Four of the counts,

alike in substance, aver it was their duty so to manage said machinery and appliances, and let down said cages so slowly and cautiously as to prevent harm and injury to the plaintiff while engaged at such labor, and to give him warning of their descent, that he might move out of their way before they should reach him; and a fifth, that it was their duty to keep the shaftway clear of steam or other matter that would obstruct his vision, and prevent his seeing them; but that on the 20th of January, 1882, they let down a cage while the shaft was filled with steam, without warning him, and so swiftly and incautiously that while performing labor as aforesaid, with due care and caution, he was unable to see it descending or to escape from it, and was caught under it and thereby badly crushed and injured.

The trial resulted in a verdict for the plaintiff for \$500 damages, which the court refused to set aside, and upon the entry of judgment thereon the defendants appealed.

It appears that the shaft was about 250 feet deep. Two cages lowered and hoisted by steam power from an engine thirty-five feet distant from it, were used to carry up and down men, coal, and whatever else went to or came from the mine. They were operated by a rope over pulleys, and as one came up the other went down. They were lowered even with the bottom of the pit so that the coal trucks could be pushed directly on and off them, and rested on timbers over a sump or sink in which water constantly accumulated. So much of this as was needed for the purpose, was bailed into barrels and supplied drink for the mules, of which there were fifteen being worked in the mine, and the rest was pumped out by steam power when the pipe was in order, and when not, was also bailed by hand with buckets into barrels, and hauled out of the way. It was necessary to do this in order to get the cars on and off the cage, to and from the tracks. If it overflowed, it would be difficult to let down or raise the cage or adjust it to the tracks. At the time of the accident the pipe was out of order so that the pump could not be used.

Among those employed below was a cager, Cooper, who

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had charge of the cages at the bottom—pushed the loaded cars on and the empties off. He had communication with the engineer above by means of a wire attached to a bell in the engine house, and indicated to him by the number of bells when to lower, when to hoist, when to lower slowly, and when to let the cage stand. The engineer was not to move a cage without his signal. This, however, was an arrangement between them alone. Nor was it observed except when they were raising coal. Before doing that, of course, the men who worked below, including the cager himself, had to be let down, and this was done without warning to those already down, except at times, by hallooing from the landing at the surface or from the cage as it descended.

But no signal was required to be given, nor was any system used to warn persons at the bottom, of its approach. They depended on seeing or hearing it. No coal was raised in the morning before the accident in question occurred, which was between eight and ten o'clock. They had been repairing the boiler and were late in getting up steam.

There was also a roadman, Wadsworth, whose special duty it was to lay and take care of the tracks in the mine and the pit cars, and to timber and to wall under the driveway—in general, to see to the facilities for getting the coal from the rooms to the bottom of the shaft. But in the absence of Hahn, who was superintendent and immediate director of the work and men above and below, he took some general charge, in fact, of the work and men in the pit. He did not hire nor discharge anybody and had no authority whatever.

He was sometimes called the pit boss by some of the men, but there was no pit boss, because Hahn was generally within call, and all the men were alike subject, immediately, to his orders. Wadsworth never had anything to do with signaling the engineer.

Appellee was employed to take care of the mules and as a common laborer to help anybody in anything he could do, as he should be called on. It was a part of his duty to bail out the sump when necessary, though others sometimes did it without him and at others assisted him in doing it. On the

morning of the accident he was so engaged for about two hours before they got up steam. He says as soon as they did get it up, they turned it into the shaft for ventilation as he supposed, though he had never known it to be done before. He continued at this work a little while after, and until the north cage, which had been resting on the bottom, was pulled up, when he left. Wadsworth coming up, asked why he had stopped dipping. He replied because they had just taken that cage away. Wadsworth then said, "You needn't be afraid they will let the cage on you, I want you to hurry up and get that water out," and passed on. Appellee waited a few minutes and then, everything appearing quiet in the shaft, resumed the work and continued at it some ten or fifteen minutes, when the south cage came down upon and crushed him.

Just at that time the shaft was so full of steam he could not see it coming, and the hissing was so loud he could not hear it. No signal had been given. The cager, who was assisting him by taking the buckets as he handed them up and emptying them into the barrel, saw it just before it struck him, and rang the bell several times and then halloed, but the lowering was not stopped nor was the cage lifted off him by the engine. The men pried it off and took him out.

It does not appear that either of the appellants was about the premises that morning, or that Hahn, though present above, directly or indirectly gave an order to appellee about dipping, or to the engineer about letting steam into the shaft, or lowering the cage. Nor did Wadsworth, further than has been stated. Camp, the engineer then in charge, died before the commencement of the suit.

The foregoing is believed to be a full and fair statement of appellants' case upon the evidence. There is no controversy as to these facts, excepting the authority of Wadsworth over him. He and some other witnesses say he was under his direction as pit boss. Wadsworth and others deny it.

On the whole we think he was no more under Wadsworth's direction than of any other employe whom he assisted for the time being.

But however that may be, we are of opinion the verdict was against the law. Upon the facts shown, including the

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assumption of Wadsworth's authority, appellants are not liable for the injury. The only acts of negligence charged are the manner of letting down the cage and the letting of steam into the shaft. These were acts of the engineer, without special direction from appellants, and he was a fellow-servant of appellee. The employment of the one was to prepare the bottom of the shaft to receive the cage, and of the other to lower the cage upon the bottom so prepared. They habitually co-operated to the same particular end.

Nor is it clear that the engineer was in fault. It was not incumbent upon him at his engine to give the men below any special warning of the descent of the cage. The ascent of the other was notice of its imminence, and its descent could be seen or heard by ordinary care to observe, which was the duty of those working where they were liable to be injured by it. If the steam in the shaft was unusual and hindered, it was there for a proper and important purpose, according to appellee. It gave ample notice of its presence. Its effect upon the senses of sight and hearing were clearly apparent, and imposed a greater degree of watchfulness on the part of those who were exposed, to avoid injury. What duty, then, did the engineer disregard?

Appellee saw the danger and spoke of it. For that reason he quit the work and did not immediately obey the direction to resume it. He knew that Wadsworth's expression was but an opinion, that he had nothing to do with signaling the engineer, and that the cager, his assistant at the time, could signal him; and with this knowledge he voluntarily took the risk, which yet involved no negligence of the engineer.

His right to recover is not put upon the ground of Wadsworth's statement and direction. That is expressly disclaimed in the argument. If it were and Wadsworth had authority to direct him, he did not direct him to do anything out of the line of his employment, and therefore the case of *Lalor v. C., B. & Q. R. R. Co.*, 52 Ill. 401, is not in point.

For these reasons the verdict ought to have been set aside, and for the error in refusing to do it the judgment will be reversed and the cause remanded.

Reversed and remanded.

THOMAS KNOX, SR.,
v.
LOUIS OSWALD.

Mortgages—Crop Raised after Foreclosure and Sale—Rights of Bona Fide Purchaser.

1. Where a mortgagor remains in possession after foreclosure and sale, and produces a crop, one who purchases such crop in good faith and before the appointment of a receiver, will be protected.

2. In the case presented it is held that the court below improperly sustained exceptions to the answer, which distinctly denies the good faith of the purchaser of the crop.

[Opinion filed August 26, 1886.]

APPEAL from the Circuit Court of Greene County; the Hon. CYRUS EPLER, Judge, presiding.

MR. MARK MEYERSTEIN, for appellant.

When the mortgagor is left in possession, the true inference to be drawn is an agreement that he shall possess the premises at will in the strictest sense, and he is not even entitled to reap the crop.

The crops growing on mortgaged land are covered by the mortgage, whether planted before or after its execution, until they are severed, and the lien of the mortgagee attaches as well to the crops as to the land. Rankin v. Kinsey, 7 Ill. App. 215; Yates v. Smith, 11 Ill. App. 459; Anderson v. Strauss, 98 Ill. 485; Turner v. Armstrong, 9 Ill. App. 24; Sugden v. Beasley, 9 Ill. App. 71.

The sale under foreclosure did not exhaust the mortgage lien. Haas v. Chicago Building Society, 89 Ill. 498.

MR. JOHN G. HENDERSON, for appellee.

The purchaser takes crops growing at time of sale. Jones v. Thomas, 8 Blackf. 428. But where a purchaser under a foreclosure sale suffers the mortgagor or one claiming under

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him, to occupy the premises without interference, the occupant may plant crops and claim them as emblements. 1 Washb. Real Prop., 138, Sec. 21; Allen v. Carpenter, 15 Mich. 38.

The case at bar is a stronger one than the Michigan case, for it seems that the mortgagee dispossessed the mortgagor at the end of three months in that case, while in this case the mortgagor is still in the undisturbed possession of the premises.

The mortgagee may at any time, after default, enter and take possession of the land by ejectment or writ of entry, though he can not make the mortgagor account for past or bygone rents, for he possessed in his own right, and not in the character of a receiver. Silverman v. N. Y. Mutual Life Ins. Co., 5 Ill. App. 124.

After condition broken, the mortgagee may enter and render his security productive by the perception of the rents and profits. But, like owner of the freehold, the mortgagor is not required to account to the mortgagee for rents and profits while he remains in possession. Moore v. Tatman, 44 Ill. 367; M., V. & W. R. R. Co. v. U. S. Ex. Co., 81 Ill. 534; Amer. Bridge Co. v. Heidelbach, 94 U. S. 798.

CONGER, J. A bill in chancery was filed by appellant Knox, to foreclose a mortgage executed to him by Roberts, a decree obtained, and on the 30th of April, 1885, the Master in Chancery sold the land, and Knox became the purchaser for \$3,300, leaving a deficiency of the total amount of the decree, interest and costs, of \$478.49. Roberts remaining in possession in the spring of 1885 and after the sale, planted a crop of corn upon the premises and on the 18th day of August, 1885, as Oswald claims, he bought said crop of corn from Roberts for a valuable consideration, and in good faith.

It also appears that on September 11, 1885, an execution was issued for said deficiency against Roberts, and was returned September 15, 1885, by the Sheriff, *nulla bona*. On the 2d day of October, 1885, on the petition of Knox and by virtue of a provision of the mortgage, the court in the same case

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entered an order appointing a receiver to take charge of and sell said corn crop.

At the February term, 1886, the said Oswald filed a petition showing that he purchased said corn in good faith without any knowledge that Knox had any claim upon it, that he is the owner of it, etc.

To this petition Knox filed an answer setting up at length the foreclosure proceedings, the sale, the deficiency, the appointment of a receiver, and concludes with an averment that Oswald did not purchase the corn in good faith or otherwise, and that such pretended purchase is only a pretense to defraud him, etc. Exceptions to this answer were filed, sustained by the court, and a decree entered finding the property in the corn to be in Oswald, from which finding of the court Knox appeals.

The question presented is not, as counsel for appellant seem to suppose, whether all crops growing upon the mortgaged premises at the sale pass to the purchaser, nor the power of the receiver to collect the rents, issues and profits arising out of the land, nor whether the mortgage security was exhausted by the sale. These propositions may all be as contended by appellant, but neither, in our judgment, would give him a right to the property in question.

It is not only the right of mortgagor and mortgagee, but those of an innocent purchaser for value, which are to be considered. From the day of the sale to the appointment of the receiver, whatever the rights of the mortgagee may have been to reach crops grown in the meantime while the property of Roberts, or his interest in rents, it is, we think, clear, there was no such existing lien upon such corn as would prevent Oswald from purchasing it from Roberts in good faith and for a valuable consideration.

As was said in *Haas v. Chicago Building Society*, 89 Ill. 498, "The security, plainly, is not exhausted by the sale, for there is a fund included in it which is secondarily liable. It is true the mortgagee has elected to foreclose and sell, but then he has pursued that remedy to the end and without getting satisfaction of his debt, and he may avail himself of any just and equitable means of collecting the residue."

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The just and equitable means to which, in this case, the mortgagee might resort to collect the residue of his debt after the sale, would be to ask that a receiver take possession of the mortgaged premises, and apply from that date whatever could be found of the mortgagor's interest in the premises; but we think it would be not only unjust but inequitable to permit the receiver to seize this corn raised upon the mortgaged premises, during a time when the mortgagor had a right to their possession and control, and sold to an innocent purchaser for value before the mortgagee had taken any steps to enforce his latent and dormant rights.

We have discussed the question thus far upon the theory that Oswald's petition was true. We think, however, the court erred in sustaining the exceptions to the answer of Knox, for in this answer he distinctly denies that Oswald was a purchaser in good faith or otherwise. If that part of the answer is true, then Oswald has no right to interfere.

Issue should have been joined upon this question, and if, upon a trial, Oswald's petition had been found true in this respect, then the finding of the court would have been proper.

The decree of the Circuit Court will therefore be reversed and the cause remanded, that issue may be joined upon the petition and answer as to the purchase in good faith and for value on the part of Oswald and that a decree may be entered in accordance with the finding upon that question.

Reversed and remanded.

JOSEPHUS SCOTT

V.

SAMUEL P. SHARP AND J. H. RICE.

Contradictory Evidence—Question for Jury.

Where the only ground relied upon for the reversal of a judgment is that the verdict is contrary to the evidence, and the evidence is so contradictory that, in the opinion of this court, it was for the jury to decide which side was worthy of belief, their finding will not be disturbed.

[Opinion filed August 26, 1886.]

Scott v. Sharp and Rice.

IN ERROR to the Circuit Court of Edgar County; the Hon. J. F. HUGHES, Judge, presiding.

Mr. ROBERT L. MCKINLAY, for plaintiff in error.

Where the jury capriciously disregard the evidence a new trial should be granted. C., B. & Q. R. R. Co. v. Stumps, 69 Ill. 409.

A verdict against the evidence can not be sustained. C. & A. R. R. Co. v. Rice, 71 Ill. 567.

In all cases where the verdict is palpably against the weight of the evidence it should be set aside. Belden v. Innis, 84 Ill. 78.

Messrs. H. S. TANNER and WILLIAM E. DAVID, for defendants in error.

Conflicting testimony is left to the jury, and it is the province of that body to weigh it, and unless gross wrong is perpetrated by the jury the verdict will not be disturbed. Carpenter v. Ambrosion, 20 Ill. 170.

Per Curiam. This was a suit originally brought before a Justice of the Peace to recover the value of mole ditches made by defendants in error for plaintiff in error, and the case was appealed to the Circuit Court, where it was tried and judgment rendered against plaintiff in error for \$104.80.

No instructions were given, and the ground relied upon for reversal is that the verdict is contrary to the evidence. We have examined the evidence and find it so contradictory that we think it was for the jury to determine which side was worthy of belief, and that their finding ought not to be disturbed. Com. M. L. Ins. Co. v. Ellis, 89 Ill. 516. The judgment of the court below will be affirmed.

Affirmed.

Gregg v. Sumner.

WM. M. GREGG, IMPLEADED WITH CHAS. O. GREGG,
V.
EDWARD C. SUMNER.

Privilege of Parties and Witnesses from Service of Process in Civil Actions—Question may be Raised by Plea in Abatement or Motion—Office of Plea in Abatement.

1. Parties and witnesses while in good faith attending upon the trial of a cause in court are protected from service of legal process in civil actions, the privilege extending so long as may be fairly required in going to and returning from the place of trial.

2. The question whether a party is entitled to the benefit of this privilege may be raised by plea in abatement, although it is often presented by motion.

3. It is the office of a plea in abatement to set up matter which merely defeats the present proceeding, but does not bar the cause of action, and it must give the plaintiff a better writ.

Protection Ins. Co. v. Palmer, 81 Ill. 88, distinguished.

[Opinion filed August 26, 1886.]

APPEAL from the Circuit Court of Vermilion County; the Hon. J. W. WILKINS, Judge, presiding.

Messrs. MOSES, NEWMAN & REED, for appellant.

Parties, witnesses and jurors are privileged from service of legal process in civil actions while in good faith they are in attendance upon a trial of a cause in court. This privilege exists during the time fairly occupied in going to and returning from the place of trial and hearing, as well as during the time when the party is in actual attendance at the place of trial. *Brooks v. Farwell*, 4 Fed. Rep. 166; *Funeau Bank v. McSpedan*, 5 Biss. 64; *Bridges v. Sheldon*, 7 Fed. Rep. 17; *Plimpton v. Winslow*, 9 Fed. Rep. 365; *Lyell v. Goodwin*, 4 McLean, 329; *Person v. Grier*, 66 N. Y. 124; *Nichol v. Horton*, 14 Fed. Rep. 327; *Larned v. Griffin*, 12 Fed. Rep. 590; *Matthews v. Tufts*, 87 N. Y. 568; *Thompson's Case*, 122 Mass. 428; *In re Healy*, 53 Vt. 694; *Dungan v. Miller*, 8 Vroom, 182; *Grier v. Young*, 17 Ill. App. 106.

Plea in abatement is a proper way to raise the question presented here. There was an issue of fact as well as of law possible, and hence a plea was the proper practice. *Waterman v. Tuttle*, 18 Ill. 292; *Hamilton v. Dewey*, 22 Ill. 490; *Wallace v. Cox*, 71 Ill. 548; *Drake v. Drake*, 83 Ill. 526; *Gilker v. Vanderpool*, 15 Johns. 242.

Messrs. O. L. DAVIS and J. B. MANN, for appellee.

A plea in abatement must be "to a certain intent in every particular," leaving on the one hand nothing to be supplied by intendment or construction, and on the other, no supposable special answer unobviated. The pleader must not only answer fully what is necessary to be answered, but also must anticipate and exclude all such supposable matter as would, if alleged on the opposite side, defeat his plea. *Gould on Pleading*, Chap. 3, 57, 58; *Diblee et al. v. Davison*, 25 Ill. 486.

The question of proper service should have been raised by motion. *Grier v. Young*, 17 Ill. App. 106; *Protective Life Ins. Co. v. Palmer*, 81 Ill. 88.

WALL, J. The present suit was commenced in the Circuit Court of Vermilion County. The appellant filed his plea in abatement, alleging that he was a citizen and resident of Cook County, and that at the time of the service of summons herein he was in Vermilion County for the purpose of testifying in a certain cause then pending in the Circuit Court, in which he was a party plaintiff, having come there upon the advice of counsel for said purpose, and that after he had so testified and while the jury were considering the case, and while he was still in the court room, and before he had time to take his departure, he was served with the said summons. The Circuit Court sustained a demurrer to the plea, and the appellant not answering further, judgment was entered for the plaintiff. The plea clearly shows that service was had while appellant was in attendance as a suitor and witness in the court and before a reasonable time for him to depart from the court had elapsed, and the question is whether in a legal sense he was "found" in the county when served with the summons. There is no doubt

Gregg v. Sumner.

that by the great weight of authority, it is an established and well settled principle that parties and witnesses are privileged from service of legal process in civil actions while in good faith attending upon the trial of a cause in court, and the privilege extends in point of time so long as may be fairly required in going to and returning from the place of trial as well as while the party is in actual attendance there. Among many may be cited the following: Larned v. Griffin, 12 Fed. Rep. 590; Person v. Grier, 66 N. Y. 124; Matthews v. Tufts, 87 N. Y. 568; Edward Thompson's Case, 122 Mass. 428; Dungan v. Miller, 8 Vroom, 182; Grier v. Young, 17 Ill. App. 106.

It is urged, however, that the question was not properly raised by plea in abatement, but should have been presented by motion.

There are many cases where a motion has been entertained for this purpose, and in modern practice, for the sake of convenience, motion has been substituted for plea in abatement with the apparent sanction of the court in sundry instances, where, strictly speaking, it might not seem exactly technical or logical, but we do not think the innovation has gone so far as contended for.

The office of a plea in abatement is to set up matter which merely defeats the present proceeding but does not show that the plaintiff is forever concluded, and it must give the plaintiff a better writ. 1 Ch. Pl., 446 *et seq.*

Technically considered, the facts set up here present matter in abatement of the present suit, but do not bar the plaintiff forever.

The case of Protection Ins. Co. v. Palmer, 81 Ill. 88, cited by counsel, is not in point.

There the writ was served upon one who was supposed to be the agent of defendant corporation but was not, and the court said there was no error in striking from the files a plea in abatement based on this mistake, because, if the person served was not the agent and the return was quashed, it would not give a better writ. A better service might be had, but not a better writ. For aught appearing the suit was commenced in the proper county. Here the facts pleaded show that

Morrison v. Stewart.

Cook, not Vermilion, was the proper county in which to sue and this gives the plaintiff a better writ. We are of opinion the court erred in sustaining the demurrer to the plea in abatement. The judgment will be reversed and the cause remanded.

Reversed and remanded.

MORRISON & WHITLOCK

v.

JAMES M. STEWART.

Error in Judgment—Amendment.

Where a judgment has been inadvertently entered for the plaintiff instead of for the defendant, an amendment may be allowed upon motion even after the expiration of the term.

[Opinion filed August 26, 1887.]

APPEAL from the Circuit Court of Fulton County; the Hon. JOHN C. BAGBY, Judge, presiding.

Messrs. MORRISON & WHITLOCK, for appellant.

During the term and while the cause is still pending the court has the right to correct errors, but after a term has elapsed the power of the court to correct substantial errors is at an end. Under the common law, a record imports absolute verity. *Forquer v. Forquer*, 19 Ill. 67; *Coughran v. Gutchens*, 18 Ill. 390; *Cook v. Wood*, 24 Ill. 295; *Becker v. Sauter*, 89 Ill. 596; *Goucher v. Patterson*, 94 Ill. 525; *Gillett v. Booth*, 6 Ill. App. 423.

Even if amendment be made it must be by the minutes of the Judge. *Millard v. Cooper*, 10 Ill. App. 47; *People v. Zane*, 105 Ill. 662; *Lilly v. Shaw*, 59 Ill. 72.

Messrs. H. W. MASTERS and O. A. DELEUW, for appellee.

Merrison v. Stewart.

The right to amend a judgment on account of a clerical error, by the court in which the error occurs, is a common law right. *Atkins v. Hinman*, 2 Giln. 437; *Lyon v. Boilvin*, 2 Giln. 629; *O'Connor v. Mullen*, 11 Ill. 57; *Stahl v. Webster*, 11 Ill. 511; *Mains v. Cosner*, 67 Ill. 536; *Baragwanath v. Wilson*, 4 Ill. App. 80.

Per Curiam. The appellants sued out a writ of replevin against the appellee. At the return term they dismissed their suit and an order appears on the Judge's minutes showing such dismissal, as follows: "Plaintiff dismisses suit at his cost, and return of property awarded and one cent damages for plaintiff." The clerk entered up judgment accordingly. At a subsequent term motion was made, due notice having been given to amend the judgment so as to show that a return of property and judgment for cost was awarded in favor of defendant instead of plaintiffs. The Circuit Court, on inspection of the record and hearing the testimony of the Judge who presided at the time the original order was made, allowed the motion to amend. From this order an appeal is now prosecuted. It is quite apparent that the word "plaintiff," as it appears at the end of the Judge's minutes, was used inadvertently, and that the word "defendant" was intended. This mere slip of the pen should be corrected, and as we understand the current of modern decisions in the United States, is a proper subject of amendment even after the term at which it occurred. It is one of those cases where it "so clearly appears that the judgment as entered is not the sentence which the law ought to have pronounced, upon the facts as established by the record, that the court acts upon the presumption that the error is a clerical misprision rather than a judicial blunder, and sets the judgment, or rather the judgment entry, right, by an amendment *nunc pro tunc*." *Frecman on Judgments*, Sec. 70; *Ives v. Hulce*, 17 Ill. App. 30.

Affirmed.

Wehr v. Brooks.

MARY ANN WEHR
v.
JAMES W. BROOKS, EXECUTOR.

Action for Personal Injuries—Survivorship—Statute—Parties.

Under Sec. 123, Ch. 3, R. S., a right of action to recover damages for an injury to the person survives. This survivorship applies in case of the death of the defendant as well as that of the death of the plaintiff.

[Opinion filed August 26, 1886.]

IN ERROR to the Circuit Court of Sangamon County; the Hon. JESSE J. PHILLIPS, Judge, presiding.

MESSRS. ORKENDORFF & PATTON, for plaintiff in error.
No counsel appeared for defendant in error.

Per Curiam. Plaintiff in error sued the deceased, in case, to recover damages for personal injuries by a cow alleged to have been kept by him with knowledge that she was vicious. Upon his death, after service of process and before trial, his executor was made defendant in his stead. There was a verdict for the plaintiff which the court set aside, whereupon the executor obtained leave to withdraw the pleas and then moved for judgment that the suit abate, because of the death of the original defendant since it was commenced, which was also allowed and the judgment entered.

This was error, the common-law rule being changed by Sec. 123 of Ch. 3 of the R. S., providing that "in addition to the actions which survive by the common law, the following shall also survive actions of replevin, actions to recover damages for an injury to the person," and others mentioned. This survivorship is not limited as to parties; that it applies in the case of the death of plaintiff was expressly held in *Murphy v. McGrath*, 79 Ill. 594; and in that of the death of defendant clearly implied in *Knox v. City of Sterling*, 73 Ill. 214.

For this error the judgment is reversed and the cause remanded.

Reversed and remanded.

Catlett v. Dougherty.

HERALD CATLETT
V.
JOHN H. DOUGHERTY.

Statute of Frauds—Contract for Sale of Lands—Parol Rescission—Re-sale—Possession.

1. A rescission of an executory contract for the sale of lands is within the Statute of Frauds, and requires the same evidence to establish it as is required to establish a sale.

2. A transfer or re-sale of lands to the original owner by one in possession thereof under the contract of purchase is within the Statute of Frauds, and requires some evidence in writing to sustain an action for the consideration.

3. In the case presented the attempted transfer was an intended re-sale and not a rescission of the original contract, said transfer being of a less interest than that covered by said contract.

[Opinion filed May 21, 1886.]

APPEAL from the County Court of Vermilion County; the Hon. J. F. HUGHES, Judge, presiding.

MESSRS. LAWRENCE & THOMPSON, for appellant.

An action at law can not be maintained for the purchase money of land in the absence of any note or memorandum of the sale, and the fact that there was part performance does not take the case out of the Statute of Frauds. *Creighton v. Sanders*, 89 Ill. 543; *Johnson v. Hanson*, 6 Ala. 351; S. C. 41 Am. Doc. 54; *Updike v. Armstrong*, 3 Scam. 564; *Fleming v. Carter*, 70 Ill. 286; *Wheeler v. Frankenthal*, 78 Ill. 124; *Hughes v. Moore*, 7 Cranch. 192.

The case is not taken out of the Statute of Frauds, because the contract of sale is not established by competent proof to have been clear, definite and unequivocal in all of its terms. *Worth v. Worth*, 84 Ill. 442; 4 Kent Com. 4th Ed. 519.

And further, the acts of part performance, which in this case is alleged possession, must have been unequivocally in execution of the parol agreement, and not referable to a title

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distinct from the parol agreement. *Wallace v. Rapploye*, 103 Ill. 229; *Frame v. Davison*, 14 Ves. 389.

Messrs. O. L. DAVIS and J. B. MANN, for appellee.

Appellee is not seeking to enforce any contract to purchase land, nor to recover for a breach of a contract to purchase land. He is merely seeking to recover the price of land, or of an interest in land sold and conveyed.

Under the contract offered in evidence appellee had an estate in the land and was indeed an equitable owner. But he only had such interest by virtue of the contract, and when that contract was rescinded the rescission was *ipso facto* a conveyance or merger of the equitable title in the legal title owned by appellant, and was all that was necessary to be done in order to completely extinguish the title of appellee and vest it in appellant. Such rescission could be made by parol as well as writing. *Falls v. Carpenter*, 28 Am. Dec. 605; *Dearborn v. Cross*, 7 Cow. 48; *Morrill v. Colehour*, 82 Ill. 619; *Brown v. Gaffney*, 28 Ill. 149.

Where a contract has been fully executed and nothing remains to be done but the payment of the money, a recovery may be had upon the money counts. *Eggleston v. Buck*, 24 Ill. 262; *Lane v. Adams*, 19 Ill. 167.

When appellee put appellant into possession of the property with the agreement to surrender all his rights under the written contract, he fully performed his part of the contract and was entitled to receive his money.

CONGER, J. The only question in this record necessary to discuss is one arising upon the Statute of Frauds. In November, 1878, by a written contract, executed by Catlett and Dougherty, the former agreed to sell and convey to the latter certain lots of land upon which stood a mill, for the price of \$4,613.13. Afterward Dougherty sold one half interest in the property to one McCabe, and afterward, in September, 1881, as testified to by Dougherty, he sold the other undivided half of the mill back to Catlett by a parol contract, at the price of \$3,500.

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The present action was assumpsit to recover various items of account of which the principal one was this \$3,500.

Upon the trial below the court permitted appellee, against the objection of appellant, to prove by parol the verbal contract by which he claimed to have sold the one half interest in the mill property to appellant, and this is the principal error assigned.

It is insisted by appellee, that the transaction was not a sale of an interest in the land but merely a surrender by him to appellant of the equitable interest which appellee held by virtue of the written contract. That as the legal title was in appellant all the time, appellee might well surrender the right of possession, and the equitable right to a conveyance which he held by parol, and that it needed no writing to legally effectuate this purpose.

It would make no difference whether the transaction be regarded as a sale or the rescission of the executory contract, for both would be within the Statute of Frauds, and require some evidence in writing to sustain them. We are inclined to think, however, that the transaction, as testified to by appellee, was not a rescission of the written contract, for there was no attempt by the parties to place themselves in *statu quo*, but that it was intended as a re-sale, for it was of a portion of the property only and not what had been originally purchased, and also for an increased price.

The Statute of Frauds declares: "No action shall be brought to charge any person upon any contract for the sale of lands, tenements or hereditaments, or any interest in or concerning them, for a longer term than one year, unless such contract or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some person thereunto by him lawfully authorized in writing, signed by such party."

Appellee had by virtue of his written contract an equitable interest in the property. He was also in possession, which is *prima facie* evidence of title, and both of these interests are within the meaning of the statute, and could not be transferred to appellant by parol, so as to make him liable for the purchase

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price. And this, too, whether the transaction be regarded as a sale or an attempt by parol to rescind the written contract by which appellee became vested with such equitable interest, for both would be within the statute, and require evidence in writing to sustain them; for, "The very object of the statute is to prevent the divestiture of a title to real estate, equitable or legal, by the introduction of loose and indeterminate proof of a contract which the law requires should be made in the most solemn form." *Goucher v. Martin*, 9 Watts, 106.

"A contract for the sale and delivery of the possession of land and the improvement thereon must be in writing, otherwise it is within the Statute of Frauds. Possession is *prima facie* evidence of title, and is an interest in land within the statute." *Howard v. Easton*, 7 Johns. 205.

"An oral rescission of the sale of lands is not valid under the Statute of Frauds. A verbal contract to rescind a written one by which land had become vested is within the Statute of Frauds." *Reed on Statute of Frauds*, Vol. 2 Sec. 456.

"An agreement for the rescission of an executory contract for the sale of land is within the Statute of Frauds, and requires the same evidence to establish it as is required to establish the sale." *Dial v. Crain*, 10 Texas, 444.

"That the fourth section extends to and embraces equitable as well as legal interests in land is well settled. It has been held by Mr. Justice Story that a verbal contract to buy a contract for lands, or in other words to buy another man's rights under an executory agreement for the sale of lands to him, was affected by the statute because it was for the purchase of an equitable interest in real estate." *Broom on Statute of Frauds*, Sec. 229.

We do not think the case of *Morrill v. Colehour*, 82 Ill. 618, cited by appellee, in any sense militates against this doctrine. The court in speaking of the written contract between the parties say: "The written agreement executed by Colehour only binds him to pay appellant and the others equal portions of the one half of the net profits arising from the sale of the lands. It in no event bound him to convey the land, nor can we imagine any state of facts that could arise:

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under the agreement that would require a court of equity to compel him to convey the land to them. * * * It was not bought to hold as land, but simply as an article of commerce and for speculation, and for that reason equity regards it as personal property among the partners. In such cases the intentions of the parties stamps the character of the transaction. We are for these reasons of opinion that this (the parol contract) was not a contract for such an interest in lands as to fall within the Statute of Frauds, and was not therefore void, because it was not in writing." They there hold that the terms and conditions of this written contract might be dispensed with by parol, for the very reason, as we understand, that the interest held by the written contract was under the circumstances regarded as personalty and not an interest in land within the statute.

Appellee's counsel in their argument say, "we are unable to perceive the application of the Statute of Frauds to this case. Appellee is not seeking to enforce any contract to purchase land, nor to recover for a breach of a contract to purchase land. He is merely seeking to recover the price of land or of an interest in land sold and conveyed."

We hold the alleged parol contract being void, conveyed nothing, and it is clear that no action can be maintained for the purchase price solely as such when the contract of sale is itself void and passes nothing to the purchaser.

It is also insisted that "full performance takes the case out of the statute." True; but here is only possession taken under a parol contract which falls far short of full performance, or such part performance as would avail to take the case out of the statute; and part performance would not avail appellee in this action, as "part performance of a verbal contract within the Statute of Frauds has no effect at law to take the case out of its provisions; this can only be done in equity." *Wheeler v. Frankenthal & Bro.*, 78 Ill. 724.

For the error of the court in admitting evidence of this parol contract the judgment of the Circuit Court will be reversed and the cause remanded.

Reversed and remanded.

Potts v. McPherson.

PHILIP B. POTTS AND CATHARINE POTTS
v.
LESLIE G. MCPHERSON, JONATHAN MEEKER AND
SARAH SHUTE.

Chattel Mortgage—Sale by Mortgagor, Void.

1. A sale by the owner of personal property covered by a chattel mortgage, without notice to the vendee, is void.

2. A mortgagor of personal property can not recover from the purchaser at mortgagee's sale the difference between the price paid and price agreed upon between the parties on an attempted private sale prior to such sale, and before said purchaser knew of said mortgage.

[Opinion filed August 26, 1886.]

IN ERROR to the Circuit Court of Moultrie County; the Hon. C. B. SMITH, Judge, presiding.

Mr. W. H. SHINN, for plaintiff in error.

Messrs. EDEN & CLARK, for Mrs. Sarah Shute, defendant in error.

PLEASANTS, P. J. On the 29th of September, 1880, Philip B. Potts and wife executed to Mrs. Sarah Shute a mortgage of their homestead to secure the payment of three notes of said Philip—one payable to R. B. McPherson and by him assigned to the defendant in error, Leslie G. McPherson; one to Jonathan Meeker, and a third for \$650 to Mrs. Shute, all of even date with said mortgage and due in two years, with interest at eight per cent. per annum.

To enforce payment of the first two mentioned the original bill herein was filed by the respective holders, making the mortgagors and Mrs. Shute defendants, and the latter, after answering, filed a cross-bill setting up her right and praying relief upon the one held by her. To the cross-bill the defendants Potts answered that said note, which was averred to have been given for an indebtedness to William Shute, the husband

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of said complainant, had been fully paid by the sale to her through her husband of a stationary steam engine, and the mortgage released.

The issues having been made up the cause was referred to the master, and on final hearing upon the pleadings and proofs reported, a decree was entered in favor of the complainants in the original and cross-bills, in the usual form, for the full amounts of the notes so held by them, respectively.

No complaint is made of the decree upon the original bill, but the mortgagors, plaintiffs in error, insist, as to the claim of Mrs. Shute, that if it was not wholly satisfied and the mortgage released, they were entitled to a considerable credit which the Circuit Court erroneously refused to allow. It appears that about the 20th of February, 1882, Philip B. Potts, who resided and was running a saw mill in Moultrie County, sold to William Shute, who resided and was erecting a tile factory at Newman in Douglas County, a steam engine, which he was to deliver on the railroad track at Newman, together with a belt belonging to it and four hundred feet of sawed lumber, and take said note in payment, and that within a few days thereafter a release of the mortgage was left by Mr. and Mrs. Shute with Mr. Rhodes, an attorney, to be delivered to Potts only when he should have completely performed the agreement on his part. Mrs. Shute was particular and emphatic on that point, and the release was never delivered to Potts.

The engine was not shipped to Newman until the 21st of April, the delay being caused by the refusal of Messrs. Roane and Low, who held a chattel mortgage upon it for something over \$300, to permit the shipment until their claim should be satisfied. They afterward replevied it from Shute and made sale of it under their mortgage, at which Shute purchased it for \$400; and it is the difference between this price and the amount of the note which he was to surrender to Potts, under their agreement, that plaintiffs in error claim they should have been credited by the decree upon the cross-bill herein.

We do not think this claim well founded. Although the

evidence upon these points is somewhat conflicting, there is an abundance in the record to warrant the conclusions that Potts sold the engine to Shute without informing him, and that Shute at that time had no knowledge or information of the existence of the chattel mortgage; that though he afterward, and before he received the engine, had knowledge of the mortgage, he received it in the belief and with good reason for the belief that the mortgage debt had in the meantime been satisfied, and that Potts finally shipped it to Shute at Newman without the consent or knowledge of the chattel mortgagees.

Potts never performed either strictly or substantially his agreement with Shute. He was to give a clear title and pay the freight, but did neither. Shute received absolutely nothing of right under his purchase from Potts. He did not by that agreement undertake to redeem from the mortgage nor to pay a dollar in money to anybody for the engine, and was at full liberty to purchase independently, as he did, at the mortgage sale.

Furthermore, by the sale to Shute without informing him of the mortgage, Potts made himself liable, under Sec. 6 of Ch. 95 of the R. S., to a forfeiture to the purchaser of twice the value of the engine, and under Sec. 7, to a fine of the same amount or imprisonment in the county jail not exceeding one year, or both, at the discretion of the court. Such sale, being so prohibited, was void, and, since a contract which it is illegal to make can not support an action, the vendor could not rightfully claim the aid of a court of law or equity to recover the price or any part of it. *Miller v. Post*, 1 Allen, 434; *Russell v. Wheeler*, 17 Mass. 257; *Allen v. Hanks*, 13 Pick. 79; *Penn v. Bourman*, 102 Ill. 523; *Workingmen's Banking Co. v. Rautenberg*, 103 Ill. 460; *Benjamin on Sales*, Sec. 530; *Jones on Ch. Mortg.*, Sec. 455; *Anson on Contracts*, 164.

The credit was therefore properly disallowed and the decree will be affirmed.

Decree affirmed.

 Claybaugh v. Hennessy.

JOSEPH CLAYBAUGH

v.

ROBERT B. HENNESSY.

Judgment Sustained upon Review of Evidence—Surrender of Note—Practice.

1. Where a jury is waived and the cause is tried by the court, the same presumptions attach to the findings of the court as would have attached to the verdict of a jury.

2. Upon a review of the evidence, which was conflicting, the judgment of the court below is affirmed, the question being as to whether a certain agreement was in effect the surrender of a note.

[Opinion filed August 26, 1886.]

APPEAL from the Circuit Court of Edgar County; the Hon. J. F. HUGHES, Judge, presiding.

Mr. JAMES A. EADS, for appellant.

Messrs. SELLAR, DOLE & BACON, for appellee.

WALL, J. This was an action of assumpsit. Appellee held a note signed by Johnson Claybaugh as principal and Joseph Claybaugh as surety, for \$800, which had been reduced by payments to \$300. Being unable to pay this balance the principal, Johnson, said to appellee that if he could borrow the money to pay it he would do so, to which appellee, as he says, replied that he thought the sum required could be borrowed from one Bibo. According to the version of appellee he saw Bibo and learned that he would loan the money to Johnson on his note with Joseph and James Claybaugh and appellee as sureties, and so informed Johnson; and it was then arranged by him and Johnson that if such a note was made and the money obtained, appellee would retain the note he then had on Johnson and Joseph until the Bibo note, which was to run one year, was due, and if it was paid by Johnson that would settle the old note, but if appellee had to pay anything on the Bibo note, then he was to collect that on the old note. That a note

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was drawn up, signed by Johnson and his two brothers, Joseph and James, and by the former brought to appellee for his signature. He signed it and took the old note from his desk to make entry of the facts upon it when he was called out of the room by some person, and leaving the old note on the desk was absent a few moments; when he returned Johnson was gone, and so was the old note; but that did not occur to him then, nor until after the maturity of the Bibb note, when he recalled the circumstance after having searched in vain for the old note, and was then informed by Johnson that he had it and owed appellee nothing on it. The note to Bibb was paid by appellee, Joseph, and James, in equal parts, and it is to recover the part paid by appellee that this suit was brought against Johnson and Joseph.

The case was heard by the court without a jury and there was a finding and judgment for the plaintiff below for \$132. The same presumptions attach to this finding of the court that would to the verdict of a jury. It is purely a question of fact what was the arrangement, and whether the old note was to be given up or whether it was to remain as stated by appellee.

Johnson denies the version of appellee as to this point and insists the note was surrendered and canceled by this transaction. Joseph says he knew nothing of the alleged arrangement and would not have consented to it.

There are, however, several circumstances which point the other way. It is not probable the appellee would voluntarily and without consideration give up one third of the money secured by the old note for the sake of getting the other two thirds and the explanation made by him of the transaction is not hard to believe.

It is quite easy to believe appellant understood it the same way, and, while he now insists that such an arrangement would have put him in a more unfavorable position, it is not clear that he would have so regarded it then, or that this claim is now made in good faith. It was but a change of security so far as appellant was concerned and he probably considered it a desirable thing at the time. The conduct of appellant when appellee was trying to find the old note and before he recalled

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the circumstance of leaving it on the desk when Johnson was present tends to show that he knew more of the matter than he now admits.

There are some points on which appellee is contradicted by the testimony of Bibb and the case upon the whole proof is by no means free from doubt, but the trial court saw the witnesses, heard them testify and had the opportunity to observe many circumstances in their demeanor and general appearance which would properly affect the mind in reaching a conclusion but which it is impossible to incorporate in a bill of exceptions. We can not say, considering the evidence and the inferences reasonably to be deducted therefrom, that the finding is so clearly wrong as to justify interference by this court.

The judgment will be affirmed.

Affirmed.

WILLIAM VANLIEW
V.
SECOND NATIONAL BANK OF GALESBURG.

Negotiable Paper—Recovery pro tanto on Note Held as Collateral, though Paid to Payee—Application of Payment—Practice.

1. The holder of a note, assigned before maturity as collateral security for a pre-existing debt, may recover from the maker the amount due on said debt, although the latter has paid the note to the payee.

2. Where said amount is less than the amount of the note a recovery may be had *pro tanto*, although the declaration claims the amount of the note.

3. The maker is not entitled, upon the facts presented, to an allowance on account of a certain payment presumed to have been made to the holder by the payee.

4. This court refuses to disturb the finding of the court below that the note was assigned before maturity, there being ample proof to justify said finding.

5. This court may ignore an objection not raised below, and not specifically stated in the assignment of errors.

[Opinion filed August 26, 1886.]

Vanliew v. Second National Bank of Galesburg.

IN ERROR to the Circuit Court of Fulton County; the Hon. SIMON P. SHOPE, Judge, presiding.

Messrs. C. G. WHITNEY and C. F. ROBINSON, for plaintiff in error.

Messrs. JOHN A. GRAY and WILLIAMS, LAWRENCE & BANCROFT, for defendant in error.

WALL, J. This was an action of assumpsit on a promissory note given by plaintiff in error to A. H. Miller, for \$3,000, dated November 24, 1880, payable three years thereafter, indorsed by the payee to one O. J. Beam, and by the latter to the defendant in error. The indorsement last named was before maturity and as collateral security for a loan of \$2,000 made by the bank to Beam.

Subsequently, and a short time before this note matured, plaintiff in error gave his three notes of \$1,000 each in payment of this note which Beam informed him was temporarily out of his possession, but which, claiming to own still, he promised to obtain and hand over to plaintiff in error in a short time. Plaintiff in error made several applications for the note, but was put off from time to time and did not learn where the note was held until he received notice and request for payment from the defendant in error.

The three notes of \$1,000 each which he gave in renewal or payment of this were negotiated to third parties before maturity. It appeared that the bank took the note in suit before maturity and before payment as above stated, and that it acted in good faith. The case was tried by the court without a jury and there was a finding and judgment for plaintiff below for the amount due on the Beam note, for which this was held as collateral, \$2,073.33.

The holder of a note assigned before maturity as a collateral to secure a pre-existing debt, may recover from the maker the amount of money due him, the holder, although the maker may have paid the note to the payee. *Mayo v. Moore*, 28 Ill. 428. This proposition is not controverted, as we understand, by plaintiff in error; but it is urged that upon a decla-

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ration claiming the whole of the note, there can not be a recovery *pro tanto* for so much as the plaintiff is entitled to receive as holder for collateral security. No authority is cited for this position, and we should be surprised if any such could be found.

Prima facie the holder of the note may recover the full amount due. If he holds it merely as collateral, the surplus over his debt would be for the benefit of the payee ; but if the maker has a defense against the note in the hands of the payee, he may insist that the holder shall not recover more than the debt for which the collateral was held.

In other words, the maker may set up and avail of his defense *pro tanto* to the surplus. There is no valid reason for requiring special averments as to the amount plaintiff may recover in such case. He may declare, as was done, for the whole amount due upon the face of the paper, and recover whatever may appear from the evidence is due him from defendant.

It is next urged in the brief that the judgment is excessive by \$232.58. This point was not made in the motion for new trial, nor is it specifically stated in the assignment of errors. We might therefore properly ignore it. *Emory v. Addis*, 71 Ill. 273.

It is based upon the fact that there appears an indorsement on the note in suit of \$210 paid as interest after it came to the bank. This payment was not made by the plaintiff in error as he states, and it is to be presumed that it was made by Beam and applied by his consent or direction on other paper of his held by the bank. We find that after this interest was paid Beam renewed his note to the bank for \$2,000. It is difficult to see upon what ground the plaintiff in error can take any benefit as against the bank by reason of this payment which he did not make.

It is urged, finally, that the note was not assigned to the bank before maturity and that it was taken subject to all the equities arising out of the transaction between plaintiff in error and Beam. We deem it not incumbent upon us to state and discuss the evidence bearing upon this point, but it suffices

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to say there is abundant proof to justify the conclusion reached by the trial court. No error appearing in the record the judgment will be affirmed.

Affirmed.

MARTHA BARNES
v.
BETSY GILL.

Fraudulent Conveyance—Bill by Widow, Who Joined in It, to Set Aside—Excuse.

The widow of the grantor can not maintain a bill in equity to set aside a conveyance in which she joined as his wife, knowing it to be without consideration and for the purpose of defrauding creditors, unless she can excuse her participation in the act complained of. The excuse that she was too sick to care what she did, is insufficient when it appears that she knew the nature and effect of the deed.

[Opinion filed August 26, 1886.]

IN ERROR to the Circuit Court of Champaign County; the Hon. C. B. SMITH, Judge, presiding.

Mr. J. O. CUNNINGHAM, for plaintiff in error.

Mr. FRANCIS M. WRIGHT, for defendant in error.

WALL, J. This was a bill in chancery filed by Betsy Gill and J. E. Morrison against Martha Barnes and Thomas W. McHugh, administrator of William Gill, deceased.

The bill alleged that said William Gill died intestate, leaving the said Betsy, his widow, and being indebted to complainant, Morrison, in the sum of \$25 for a medical bill, and to complainant, Betsy Gill, in the sum of \$550 for money loaned and the interest thereon; that shortly before his death the said William Gill conveyed lot 7, block 3, etc., in Urbana, to said Martha Barnes, who was his only daughter,

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without consideration, and for the purpose of defeating complainants in the collection of their claims; that he died insolvent, his estate being insufficient to pay funeral expenses and widow's award; that McHugh was appointed administrator, and prays for an account of the moneys due complainants, and for a sale of the property so conveyed to defendant Barnes. The administrator suffered a default, and the bill was taken as confessed against him. The defendant Martha Barnes answered, admitting the indebtedness to Morrison but averring that she had paid the same since the filing of the bill; denied the indebtedness to complainant Betsy Gill, and alleged that she joined with said William McGill, who was her husband, in the execution of the said deed, now charged to be fraudulent, with a full knowledge of its purport and intent, and if there was any fraud therein, she was a participant and ought not to be heard to complain thereof. To this answer replication was filed, and the cause having been heard a decree was entered according to the prayer of the bill, in favor of complainant Betsy Gill, for \$546, to be paid out of the proceeds of the said lot, which was ordered sold, it being found the deed was fraudulent as against complainant, and though she joined therein, she was at the time suffering such physical infirmity as not to be chargeable with the consequences that would otherwise attach to her participation in said conveyance.

As to complainant Morrison the bill was dismissed, his claim having been paid. The evidence to establish the debt due the complainant Betsy Gill is mainly the testimony of McHugh. He is related by marriage to this complainant, his wife being her daughter, and though he is administrator of the estate and is a defendant to the bill and should protect the estate as far as possible, he seems not only to have made no defense but to have suggested the suit, and by his own testimony furnished important proof to the complainant.

It is quite clear the deed was made without consideration and for the express purpose of defeating Morrison in the collection of his claim, and that this was known and understood by complainant, who as the wife of said William Gill, joined with him in the conveyance.

Barnes v. Gill.

Manifestly, she can not ask the aid of equity to set aside the conveyance, unless the circumstances are such as to relieve her of the consequences ordinarily attaching to her participation in the act complained of.

The excuse offered is that she was at the time in such ill health as not to be accountable for what she did. The only evidence to support this is in the testimony of Dr. Morrison and J. O. Cunningham. Dr. Morrison says she suffered much from neuralgia and debility; that she was weak and childish, often scarcely conscious of what she was doing and taking little interest in what was going on; but that she had mind enough, if her attention was called to the transaction, to understand the nature of it. Upon his being recalled he stated that he had not seen her for six months before the deed was made, and did not know her condition at that time.

Mr. Cunningham testified, being called by the defense, that he was present on a certain occasion a day or two before the beginning of that term of court, and heard the complainant state that on the day when the deed was made Mr. Gill came home with Radebaugh, the notary who took the acknowledgment, and said to her he wanted to make the deed to prevent Dr. Morrison from collecting his bill; that the deed was not read to her, but Radebaugh informed her what it was. On cross-examination, this witness stated that complainant also said in the same conversation, that when she executed the deed she was so sick she did not care what she did, and that Radebaugh told Mr. Gill he had better keep still about the deed being made.

Regarding the case as favorably for complainant as the record will permit, it is apparent that she was fully cognizant of the nature and object of the deed. This being so, does her ill health furnish sufficient ground upon which to avoid it? The evidence of Dr. Morrison, it must be conceded, is not enough for this purpose, and this branch of the case must rest upon her own declaration, stated in Cunningham's cross-examination, that she was so sick she did not care what she did. This declaration was made shortly before the trial, when she understood the importance and necessity of an explanation.

King & Co. v. Luckey & Co.

It is evident she knew what she was doing but the position is, she was too sick to care.

Such a state of facts might exist, and call for equitable interference to set aside the act. Perhaps comprehension might be attended by an utter lack of volition, but this is so unusual as to require proof much more clear and satisfactory than is to be found in this record.

It is unnecessary to notice other features of the case discussed in the briefs of counsel. For the reason indicated the decree will be reversed and the cause remanded.

Reversed and remanded.

21	132
84	546
21	182
90	24

CHARLES A. KING & COMPANY

V.

ALONZO LUCKEY & COMPANY.

Action by Broker to Recover Advances—Gambling Transactions—Options—Evidence.

In an action by a broker to recover advances made to cover losses on purchases and sales of corn ordered by the defendants, it is *held*: That the instructions as to the strictness with which said orders should be construed were erroneous as applied to the case presented; that under the evidence the transactions in question were not gambling transactions, and that certain evidence as to the "kind" of transactions between the parties was improperly admitted.

[Opinion filed August 26, 1886.]

IN ERROR to the Circuit Court of Champaign County; the Hon. J. W. WILKIN, Judge, presiding.

Mr. FRANCIS M. WRIGHT, for plaintiffs in error.

Messrs. T. J. ROTH and J. L. RAY, for defendant in error.

The plaintiffs' account and the evidence in the case show clearly that these were gambling contracts. *Lyon v. Culbertson*, 83 Ill. 33; *Webster v. Sturges*, 7 Ill. App. 560.

King & Co. v. Luckey & Co.

And as to the plaintiffs not having filled their part of the contract, whether legal or illegal, preventing a recovery, it is entirely superfluous to cite authorities.

PLEASANTS, P. J. Plaintiffs in error owned an elevator and did a general commission business in grain at Toledo, Ohio, and defendants bought and shipped at Rantoul, Illinois. In May, 1881, the parties made an arrangement whereby King & Company were to advance money to Luckey & Company to purchase corn which was to be shipped to them for sale, and to have interest at the rate of eight per cent. per annum on daily balances due and one cent per bushel for selling. Defendants had no elevator but bought as they could by wagon loads and by contracts with farmers, on which they obtained advances from plaintiffs, and ordered sales in advance of shipments, and in some instances purchases also, to meet contracts of sales so made. For advances made on losses upon such transactions plaintiffs in error brought this suit, in assumpsit, on the common counts. Penfield was defaulted. Luckey filed the general issue and also a special plea that the promises declared on were all made in consideration of gambling contracts for the purchase and sale of options and differences in market values of grain at a future time, etc. Upon a verdict for the defendant, the court refused a new trial and entered judgment.

The account between the parties embraced other items, but those which constitute the balance claimed and are the subject of this controversy are these:

July 22, 1881. Loss, August 10, corn, purchase and sale.....	\$287.00
August 5, 1881. Loss, August 2, corn, purchase and sale.....	30.00
August 20, 1881. Loss, August 8, corn, purchase and sale.....	910.00

It is not denied that these purchases and sales were made, or that losses were sustained and advanced thereon as charged, but it is insisted, first, that they were gambling contracts, and second, that there was no authority whatever for the purchase referred to in the last item, and that the others were not in strict pursuance of the orders given.

King & Co. v. Luckey & Co.

Four telegrams from defendants to plaintiffs were introduced as follows: June 11, 1881, "Sell five August corn;" June 16, 1881, "Sell five August corn;" July 22, 1881, "Buy twelve thousand August corn," and of same date, "Sell ten August corn." It appears that upon receipt of these, respectively, plaintiffs made the sales and purchase as therein directed, but the purchase was made in two lots, 10,000 in one and two in another; and further, that the defendants having failed to ship any grain for delivery on these sales they also purchased the deficient amount of 8,000 bushels, in two lots of five and three. There was positive and uncontradicted testimony that Penfield, in the absence of Luckey, expressly directed the purchase of the 8,000 bushels, but the telegram was not produced nor its absence explained. Defendants however made no objection to the evidence.

Upon this state of the proof the court gave these instructions at the instance of defendants:

1. "That an order to sell corn does not authorize the purchase of corn, and an order to purchase corn does not authorize the sale of such corn when bought; and if you believe from the evidence in this case that when Luckey & Co. ordered plaintiffs to sell corn, the plaintiffs, without other authority or orders, went on the market and bought that amount of corn and then sold it again, and thereby loss occurred, that such losses can not be recovered of the defendants in this case.

2. "That an order to buy or to sell a certain amount of grain must be strictly complied with in order to charge the party making the order, and an order to sell 10,000 bushels of corn does not of itself authorize the sale of 8,000 bushels, or any other amount than 10,000 bushels, and does not authorize the purchase of grain for the purpose of making such sale; and therefore, if you believe from the evidence in this case that the defendants ordered the plaintiffs to sell 10,000 bushels of corn, and that the plaintiffs thereupon, without other or different authority or orders, went and bought 8,000 bushels of corn or any other amount, and then sold it again, and thereby a loss occurred, the plaintiffs can not recover such loss of defendants."

We must think these instructions as applied to this case are quite erroneous. There is no dispute that these contracts for sale and purchase were all made in June and July, and were for August delivery ; that the orders were to contract for the delivery, in August, of 20,000 bushels ; that when the time for delivery came plaintiffs had, until they purchased the 8,000 bushels objected to, only 12,000, and that the deficit was due to the neglect of the defendants alone. Having then, at the instance of the defendants, become personally bound to deliver these 8,000 bushels also, the plaintiffs were by these circumstances impliedly authorized to procure them at the charge of the defendants. So that while the legal proposition of the instruction may be sound in the abstract, it is wrong as applied, in that the hypothesis of fact contained therein wholly ignores these grounds of authority. The assumption, in the second instruction, that upon an order to sell 10,000 bushels the plaintiff sold only 8,000, is altogether unwarranted. They bought 8,000 to make it up, with the 2,000 remaining of the 12,000 after 10,000 were delivered upon the two orders for the sale of 5,000 each ; the other 10,000 they were ordered to sell and did sell.

From the evidence it is clear to our minds as matter of fact that plaintiffs strictly complied with all the orders given, and as matter of law, without reference to the evidence of Penfield's order, that they were fully authorized to make the purchase of the 8,000 bushels.

But the main question is whether these were gambling transactions within the meaning of the statute.

Upon this question three witnesses were examined. Mr. Southworth who was, during the period covered by these transactions and for sixteen years had been in the employ of plaintiff and had kept the accounts between these parties, testified most clearly and positively that these were purchases and sales of grain, actual and *bona fide*, in contemplation of its delivery and receipt, and not of settlement by payment or receipt of differences of market values, and that warehouse receipts therefor, of the full amount in each case, were delivered or received by the plaintiff; that they had never in any in-

King & Co. v. Luckey & Co.

stance, to his knowledge, dealt in options or made contracts to be settled by the receipt or payment of differences, and that in these cases they expected and had reason to expect shipments from the defendants to meet the sales; that several car loads were received by them between the dates of sale and delivery, but with orders accompanying or following each to sell them on the market in order to get the better prices ruling at the time, letting the sales for August delivery stand in the hope of getting enough of other corn in the country to fill them. Mr. Penfield, one of the defendants, testified that he understood and intended these telegrams as orders for real transactions and not for unlawful options.

Mr. Luckey's testimony was in the form of a deposition. The most material of the interrogatories, respecting the several transactions referred to in the items of charge and his answers thereto, were objected to, but admitted. The following, respecting the first, is not an unfair sample. He was asked to "explain what kind of a contract and transaction this was, and state fully whether you purchased of or sold to the plaintiffs said 10,000 bushels of corn, or whether any corn was in fact bought or sold or not in that transaction," and answered "This was an option or future contract. I did not purchase or sell any corn in connection with that transaction, neither did they purchase or sell any corn on my account in that transaction, nor was there in fact any corn purchased or sold by anybody in connection therewith."

The item does not import nor was it ever claimed that defendants purchased of or sold to plaintiffs these 10,000 bushels or any other corn. It was hardly within the province of the witness to explain or state of what "kind" was the contract or transaction in question. He should have been confined to a statement of the contract or transaction itself, leaving to the jury to determine from the facts, under the instruction of the court, whether it was or was not of the kind known to the law as option contracts. He could not have personally known, and it does not appear upon what other grounds, if any, he states, what the plaintiffs did not do and what was not done by anybody in connection therewith.

He proceeded to characterize the other transactions here

Carr v. Barnett.

involved in like manner and to tell what were and were not the intentions and acts of the plaintiffs and the other parties to the alleged contracts, as freely as of his own, but does not intimate that he was present on any occasion so referred to, nor state as of his own knowledge any facts throwing light upon anybody's intentions, except that "the defendants did not have 10,000 bushels of corn to deliver to King & Co. at that time," and that King & Co. "never, at any time, requested or demanded the delivery, neither did they offer to deliver corn to fill" the contract. If he means they never so requested of or offered to the defendants, it is not very cogent, if of or to the other parties to the sale or purchase, it is not clear how he knows.

These opinions and assertions of what he could not know can not be considered as contradicting the testimony of Southworth and Penfield as to what was done and intended. The only other evidence in the case, besides the telegrams mentioned, were some letters of Luckey and a telegram, which were not pertinent to the question.

We think, therefore, that the verdict was clearly unsupported by the evidence, and if not the result of prejudice must be attributed to improper testimony admitted and erroneous instructions given, as above indicated. The judgment will be reversed and the cause remanded.

Reversed and remanded.

WILLIAM CARR
V.
JAMES BARNETT.

Replevin—Statute of Limitations—When Action Accrues—Estray—Irregular Sale.

Replevin brought to recover a horse ten years after it was irregularly sold as an estray is barred by the Statute of Limitations, the cause of action having arisen at the time of the unlawful conversion of the horse.

[Opinion filed August 26, 1886.]

Carr v. Barnett.

IN ERROR to the Circuit Court of Vermilion County; the Hon. J. F. HUGHES, Judge, presiding.

Mr. E. BOOKWALTER, for plaintiff in error.

Mr. E. R. E. KIMBROUGH, for defendant in error.

WALL, J. This was an action of replevin to recover possession of a horse.

It appeared that some ten years before the suit was brought the defendant took up the horse as an estray, had him appraised, and the animal being offered for sale under these proceedings defendant bought it and had ever since claimed and used it as his own. There was no concealment, fraudulent or otherwise, of his possession and claim, but the facts were unknown to the plaintiff until a short time before the suit was brought.

It was conceded that the law in regard to estrays was not fully complied with and, therefore, the title did not pass by the sale, but it was insisted that the Statute of Limitations of five years was a perfect defense. The court held otherwise and the plaintiff recovered.

If the defendant unlawfully appropriated the property to his own use under a claim inconsistent with that of the plaintiff, he was guilty of conversion and the plaintiff might have immediately brought and maintained trover or replevin without making a demand. 1 Gr. on Ev. Sec. 642; Hilliard on Torts, Vol. 2, Ch. 25; 1 Ch. Pl. 154.

We are of opinion that in this case the cause of action accrued more than five years before the commencement of the suit and the Statute of Limitations was therefore a good defense. The court erred in not so instructing the jury.

The judgment is reversed and the cause remanded.

Reversed and remanded.

CHARLES E. ROSE

V.

JOHN DAY.

21 139
97 282

Action for Use and Occupation—Evidence of Title—Implied Agreement to Pay Rent.

1. Possession for sixteen years, and the payment of taxes under a claim of ownership, is sufficient evidence of title to sustain an action for use and occupation.

2. Where it does not appear that a party is an intruder or trespasser on land, that he holds it against the will of the owner, or that he is to enjoy the land without rent, the law will infer an implied agreement to pay rent.

[Opinion filed August 26, 1886.]

APPEAL from the Circuit Court of Calhoun County; the Hon. GEORGE W. HERDMAN, Judge, presiding.

Mr. J. S. CARR, for appellant.

To maintain a suit for use and occupation the plaintiff must prove an express contract to pay rent or prove that he is the owner of the land used. *Bailey v. Campbell*, 1 Scam. 110.

The action for use and occupation is founded upon a contract, express or implied, and the relation of landlord and tenant must exist between the parties. *Dudding v. Hill*, 15 Ill. 61.

It affirmatively appears by the testimony of the plaintiff himself that the defendant was, and had been for five years past, in the possession of the lands for which suit was demanded, and not only refused to pay rent to Day but told him that he, Day, had no right to the land, and there is not even a pretense that he entered under Day. How then can it be said that the relation of landlord and tenant existed between them?

Messrs. BROWN & KIRBY, for appellee.

The law implied a promise on the part of appellant to pay for the use of the land.

The use of this strip of land was not adverse to Day but

Rose v. Day.

in subordination to his rights. Winslow v. Cooper, 104 Ill. 235.

The circumstance that the land was not inclosed at the place where it was used by Mr. Rose is not material. Mr. Day had used and rented the other parts of the land continuously for years, and the deed was offered to enlarge the possession. Hubbard v. Kiddo, 87 Ill. 578; Austin v. Rust, 73 Ill. 491.

The question having been fairly submitted to the jury, their verdict should be conclusive of the facts.

CONGER, J. This was an action originally commenced before a Justice of the Peace to recover for the use and occupation of a small piece or strip of land, lying between the street in front of appellant's store and the Mississippi River, used by the appellant as a landing or place from which to ship apples, and upon which he had wood piled.

Day had had possession of the quarter section of land of which the premises in controversy formed a part for the past sixteen years, paying all taxes upon it and claiming the whole under a deed purporting to convey the same to him. This was sufficient evidence of title in Day until rebutted to sustain an action for use and occupation. Keith v. Keith, 104 Ill. 397.

The only question of difficulty arising upon the record, is whether, under the circumstances as shown, an action for use and occupation can be maintained. No express contract of renting is shown. All that the evidence shows is that appellant had used the premises for five years past, and that a reasonable rent would be \$10 per year.

We are inclined to hold, under the authority of Oaks v. Oaks, 16 Ill. 106, that the jury might be warranted in inferring an implied agreement to pay rent. That case holds that, "when it does not appear that a party is an intruder or trespasser on land, or that he holds it against the will of the owner, or that he is to enjoy the land without rent, the law will infer an implied agreement to pay a reasonable rent therefor." The judgment of the Circuit Court will be affirmed.

Affirmed.

Kelley v. Wilson.

MICHAEL KELLEY

V. .

DAVID WILSON.

21	141
42	627

Personal Injury—Action for Damages—Verdict, Sustained by Evidence—Instructions.

In an action by a coal miner to recover damages for a personal injury caused by the falling of a rock from the roof of the defendant's mine, it is *held*: That the evidence is sufficient to sustain the verdict in favor of the plaintiff; that an instruction to the effect that if the jury believed any witness had willfully testified falsely they might disregard his testimony except in so far as corroborated by other "competent" evidence, is not specially objectionable; and that the court properly refused to give certain instructions asked by the defendant, the point therein contained being fully covered by the instructions given.

[Opinion filed August 26, 1886.]

APPEAL from the Circuit Court of Vermilion County; the Hon. J. W. WILKIN, Judge, presiding.

Messrs. DAVIS & MANN, for appellant.

Messrs. F. BOOKWALTER and H. P. BLACKBURN, for appellee.

WALL J. The appellee was a coal miner, and was at work in the mine of appellant.

While passing through an entry going to the room where his work was, a heavy piece of rock fell upon him from the roof inflicting serious injury for which he recovered a verdict and judgment for \$1,500.

It is not contended the damages are excessive, but that upon the facts there is no liability and that the court erred in giving, modifying and refusing instructions.

After thoroughly considering this evidence as presented in the abstract, we are unable to say that it does not warrant the jury in the conclusion that the defendant was guilty of negligence, and that the plaintiff exercised due care. It appears

Kelley v. Wilson.

the roof was known by defendant to be unsafe, and no effort was made to prop it with timbers; that on the morning of the accident Henry, the pit boss, whose duties were those of a general superintendent, discovered the dangerous condition at the point in question and tried to remove the loose piece of rock, but being unable to do so passed on to the air shaft and went to the surface that way. He says he wanted to find the men whose business it was to clear away such rubbish, and that the entry was so obstructed by what had fallen that any careful man must have noticed it, and so being warned of the danger, could easily have avoided it. At any rate he gave no notice of it but left it so, and the plaintiff coming along shortly after, was hurt. It was proved that Henry knew of the dangerous condition at this point before. The plaintiff says that, though he knew the general nature of the roof and that there were no timbers in the entry, he did not know that this piece of rock was loose, nor that there was any special danger at that place; that he had his lamp in his cap, was giving no particular attention to the roof, carrying his tools and his dinner pail in his hands, when, without any warning, the rock fell upon him. He distinctly says there was no rubbish or other obstructions in the entry.

It is clear that superintendent Henry knew the danger to which any one coming that way would be exposed, and it is a fair question of fact whether the indications of danger were so patent as to justify him in leaving no other warning. The testimony is conflicting as to this, and we can not say the jury were without warrant in their conclusion, nor can we say that the plaintiff did not use ordinary and reasonable care under the circumstances, for his own protection.

These questions having been determined by the jury upon evidence sufficient to support the finding, we are not disposed to interfere.

It is objected that the court gave the following instruction: "The court instructs the jury that if they believe that any witness who has testified in this case has testified wilfully false to a matter material in the case, that the jury are at liberty to disregard his entire testimony, except so far as he may be corroborated by other competent evidence."

Kelley v. Wilson.

The principle involved here has been approved by the Supreme Court repeatedly, and the criticism upon it by counsel is that the word "competent" is used, leaving it for the jury to determine what is competent and what is not. The adjective "credible," is often used in such instructions, sometimes the term "unobjectionable" and sometimes "unimpeached." *Crabtree v. Hagenbaugh*, 25 Ill. 233; *Yundt v. Hartrunft*, 41 Ill. 9; *McClure v. Williams*, 65 Ill. 390; *Rider v. The People*, 110 Ill. 11; *Quinn v. Rawson*, 5 Ill. App. 130. "Competent," as here used, would no doubt be understood to signify "sufficient" or "adequate," which are among its primary meanings and would refer rather to the effect than the legal quality of the evidence.

We think the instruction should not be condemned on this ground. It is urged it must have been directed at the witness Henry, and that there was no sufficient evidence upon which to base it. Henry was flatly contradicted on a material point, and it may be that if his version was not correct, he was only mistaken, his memory being at fault, or it may be he wilfully misrepresented the fact. Mere contradiction will not impeach. There must be wilful false swearing upon a point material to the issue. While it is through the medium of contradiction that the conclusion may arise that there was intentional untruth yet in general the conclusion rests mainly upon other circumstances. Regarding the testimony in this case we hold there was enough to justify the giving of the instruction.

It is urged that the court erred in modifying two instructions asked by defendant and in giving them as modified. We think no substantial or important change was produced by the modification in either instance.

It is further insisted the court erred in refusing two instructions asked by defendant upon the question of the care which was required of the plaintiff. We think the law on this subject was fully and fairly presented in other instructions.

Counsel especially urge that the second refused instruction was faultless.

Assuming it was, the point was as well made for all practical purposes in the others, which called the attention of the jury to the special matters wherein the exercise of care was

Aholtz v. Durfee.

needed, and suggested in plain terms the supposed matters wherein, from the standpoint of defendant and upon his theory of the case, might be found the proof of plaintiff's contributory negligence.

It is not to be supposed the verdict would have been different if these instructions had been given, and as the point contained in them is found in those given, their refusal is not error. No other objections are made in the argument for appellant.

The judgment will be affirmed.

Affirmed.

FREDERICK AHOLTZ

V.

JAMES F. DURFEE.

Ejectment—New Trial—Delay in Paying Costs—Insufficient Excuse.

Upon petition for the vacation of the judgment and for a new trial in an action of ejectment, it is held that a failure to pay the costs for more than a year after the close of the term at which the judgment was rendered is not sufficiently excused by an allegation that the clerk had not computed the amount thereof because of the absence of the files in the hands of some unknown person, it not appearing that the petitioner had used due diligence.

[Opinion filed August 26, 1886.]

APPEAL from the Circuit Court of Macon County; the Hon. C. B. SMITH, Judge, presiding.

Mr. H. PASCO, for appellant.

Inasmuch as the statute allows a new trial as a matter of right within a year from the rendition of the judgment, and that in the discretion of the court another new trial might be had within a year from the rendition of the second judgment, the court may grant a trial at any time within two years from the rendition of the first judgment. A failure to pay the costs

Aboltz v. Durfee.

within a year from the rendition of the first judgment is not a bar to a new trial, provided the costs are paid and petition for a new trial filed and motion entered after the expiration of one year, and within two years from the date of the rendition of the first judgment. *Riggs v. Savage*, 2 Gil. 400; *Chamberlin v. McCarty*, 63 Ill. 262; *Myers v. Phillips*, 68 Ill. 269; *Shackelford v. Bailey*, 35 Ill. 387; *Stoltz v. Drury*, 74 Ill. 107; *Rountree v. Talbot*, 89 Ill. 246.

Messrs. *OUTTEN & VAIL*, for appellee.

A party, where there is a judgment in ejectment against him, can not make a motion under the statute for a new trial during the year, and then after the year is up wait indefinitely to pay the costs, say six months, one year, or two years, at his pleasure, and then re-try the case. *Pugh v. Reat*, 107 Ill. 440; *Oetgen v. Ross*, 36 Ill. 335.

WALL, J. At the May term, 1881, of the Macon Circuit Court, the defendant in error recovered a judgment in ejectment against the plaintiff in error for a lot in the city of Decatur.

On motion of plaintiff in error entered at the same term, a new trial was granted under the statute upon payment of costs to be made within three months.

The costs were not paid until December 2, 1882—more than a year after the close of the term at which the judgment was rendered. Application was made to the Circuit Court at the February term, 1883, based upon this payment, for an order vacating the judgment of the May term, 1881, and for a new trial of the case, which was denied, and the record having been brought here by writ of error we are asked to review this ruling of the Circuit Court.

In the sworn petition filed with the application it was alleged: as an excuse for not sooner paying the costs that the clerk had not until that day computed the amount thereof, and that until so computed the plaintiff in error did not know how much it was, and hence could not pay the costs because he did not know the amount." Coupled with this is a statement that, as he believes, the papers in the case were taken out of the

Haldeman et al. v. Massachusetts Mutual Life Insurance Co.

clerk's office about the time of the trial by some unknown person, and because of the absence of the files the clerk could not make up the fee bill and let him know the amount so he could pay, etc.

This statement is quite indefinite. It does not appear how long the papers were absent, nor does it anywhere appear that plaintiff in error ever requested the clerk within the proper time to make up the fee bill, or that if he had done so the clerk could not have obtained the papers or make the necessary computation. Had such an effort been made and the payment of costs prevented, and thereby the rights of the plaintiff in error unduly prejudiced, a different case would exist. But, conceding that in such a case relief could be granted in the way here adopted, we are of opinion the petition did not disclose necessary diligence on the part of plaintiff in error, and for that reason, if for no other, the application was properly denied.

Affirmed.

MARGARET A. HALDEMAN ET AL.

V.

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY.

Usury—Broker's Commissions—Foreclosure—Solicitor's Fees—Practice—Objection not Raised Below.

1. It is a well established rule in this State that brokers, in negotiating loans of the money of others, may charge the borrower commissions without thereby making a loan at the full rate of legal interest usurious.

2. Upon the foreclosure of a mortgage the decree may include a solicitor's fee if the mortgage so provides.

3. An objection not raised in the court below may be ignored by this court.

[Opinion filed August 26, 1886.]

IN ERROR to the Circuit Court of McLean County; the Hon. O. T. REEVES, Judge, presiding.

Haldeman et al. v. Massachusetts Mutual Life Insurance Co.

Mr. THOMAS F. TIPTON, for plaintiff in error.

Mr. A. E. DEMANGE, for defendant in error.

“The fact that an agent without the authority, knowledge or consent of his principal upon loaning the money of the latter exacts from the borrower a sum in excess of the lawful interest does not make the loan usurious.” *Cox v. Mass. Mut. L. Ins. Co.*, 113 Ill. 382; *Phillips v. Roberts*, 90 Ill. 492; *Hoyt v. Pawtucket*, 110 Ill. 393.

There is no principle of law which requires that an individual or corporation having money to loan should be compelled to refuse an application offered it because the broker sending the application may charge the applicant a commission for his services. So long as there is no agreement between the loaner and broker—no actual knowledge—the transaction can not be usurious. *Hoyt v. Pawtucket*, 110 Ill. 390; *Payne v. Newcomb*, 100 Ill. 611.

The objection to the allowance of solicitor's fees can not be raised here for the first time. *K. & I. R. R. Co. v. Chester*, 62 Ill. 235; *Elgin v. Kimball*, 90 Ill. 356; *R. R. I. & St. L. R. R. v. Beckemeier*, 72 Ill. 267.

Parties are concluded by the master's report where no exceptions are interposed. *Jewell v. Rock River Paper Co.*, 101 Ill. 57; *Pennell v. Lamar Ins. Co.*, 73 Ill. 303.

WALL, J. The principal question in this case is whether the transaction disclosed a violation of the statute against usury.

It appears that Tillotson and Waite and Tillotson and Fell were engaged in the business of insurance agents and loan brokers in the city of Bloomington. The appellee, an insurance company whose home office is in the State of Massachusetts, made these men their agents for insurance at Bloomington and frequently furnished them with money to be loaned in that locality.

It was customary for one wishing to borrow money to make an application containing the necessary information as to the proposed security, etc., etc., and if the application was approved by the company the money would be forwarded to the

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broker who would pay it over to the borrower, less the commission which had been agreed on by the borrower and the broker at the beginning. It did not appear that the lender had anything whatever to do with this matter of commission, nor does it even appear that he knew of it in any instance. Of course it would be presumable in such a case that the broker was to be compensated by the borrower. The business was thus conducted for years, money being furnished repeatedly by the appellee and by other parties having money to loan upon such applications, the lender in no instance paying anything for the services of the broker. Such a transaction occurred when the debt involved here was originally contracted, and when it matured a renewal was effected through these brokers for which they made a charge, which also was paid by the borrower, but so far as shown by the evidence without the knowledge of the lender.

The appellants now testify that they considered the brokers to be not their agents but the agents of the appellee. On the other hand the brokers and the executive officers of the company testify that the brokers were understood to be the agents of the borrowers.

We think the evidence fully justifies the latter view, and that it is quite consistent with common experience and observation. The broker might be the agent of one or the other, or of both parties, and in conducting a negotiation resulting in a loan he would naturally be trusted and depended upon to some extent by both.

For example, if he is the agent of the borrower, the lender might not hesitate to send him the money direct and rely upon him to see that all the formalities necessary to render the loan legal and the security binding were complied with according to law.

In such a case it would be an unreasonable stretch to say that the lender had received some incidental service which he had not paid for but which the broker was willing to perform because of his commission which was paid by the borrower, and therefore the transaction was tainted with usury. While the courts have ever held that no shift or device to evade the

laws against usury can be tolerated, yet this statute is to be administered according to its spirit and interest and to reach the object which the Legislature designed to accomplish.

The history of such laws shows many differences of opinion as to the ground upon which and the purposes for which they have been enacted. One writer has said that a host of great names from Aristotle to Potier might be cited who rank all interest of money under the name of usury, and condemn it, but the sense of mutual benefit has on this point resisted with equal firmness the decrees of the church and the speculations of philosophers, and a regulated and reasonable interest has had the sanction not only of our own municipal law, but of the most cultivated and enlightened human reason. Lord Bacon, in discussing the subject, concludes that two things are to be reconciled, "the one, that the tooth of usury be grinded, that it bite not too much; the other that there be left open a means to invite moneyed men to lend for the continuing and quickening of trade." It is a justification for such laws that according to all experience unlimited usury leads to unlimited oppression, and that the extortion of the creditor and the resistance of the debtor tend to produce an unhealthy condition of trade and business, and no other will perhaps be generally accepted at the present day. It is purely a question of policy and expediency to be determined from the standpoint of the public good. The law, then, fixes the rate which must not be exceeded and will permit no evasion, but it will not be captious, and anxious to infer a design to evade where none existed, nor will it ingeniously build up a superstructure of usury upon an unsubstantial foundation. It is a well established rule in this State that brokers negotiating loans of other people's money may charge the borrower commissions without thereby making a loan at the full rate of legal interest usurious. *Ballinger v. Bourland*, 87 Ill. 513; *Phillips v. Roberts*, 90 Ill. 492; *Boylston v. Bain*, 90 Ill. 283; *Hoyt v. Pawtucket Ins. Co.*, 110 Ill. 390; *Cox v. Mutual Ins. Co.*, 113 Ill. 382; *Callender v. Roberts*, 17 Ill. App. 539.

The case at bar is in its facts very much like the case of *Cox v. M. I. Co.*, 113 Ill. 382, and what is there said is strongly in point, if not absolutely controlling here.

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There was no error in the decree upon this point. It is assigned as error that the decree includes the sum of \$100 for the solicitor's fee of complainant which is taxed as a part of the cost of the case. The mortgage contains a clause expressly authorizing this to be done. It provides that "it (fee \$100) shall be added to, and become a part of the debt hereby secured to be included as a part of the judgment or decree, or to be taxed as a part of the costs of such suit, as the court may elect."

A similar provision was held sufficient to support the decree in *Dana v. Rodgers*, 43 Ill. 260, and there seems to be no reason why the stipulation may not be enforced according to its terms. See also *Ball v. Miller*, 38 Ill. 110.

It does not appear, however, that this objection was made specifically in the answer, or that by any other appropriate mode it was brought to the attention of the court below, although the claim was distinctly made in the bill.

Therefore, if the objection were tenable, it might well be held that it could not be presented here for the first time.

The decree will be affirmed.

Affirmed.

DAVID H. HARTS AND STEPHEN A. FOLEY

V.

JAMES S. JONES AND JAMES A. EMMONS.

Sales—Fraud—Possession Retained by Vendor—What Amounts to Change of Possession.

1. An absolute sale of personal property which is capable of removal, but which is not removed from the possession of the vendor, is fraudulent as against creditors and subsequent purchasers, although made in good faith and for an adequate consideration.

2. This rule is held to apply to a lot of corn plows separated from the vendor's stock, and also to another lot so separated and placed in a separate building rented for the purpose, but remaining under his control.

[Opinion filed August 26, 1886.]

Harts et al. v. Jones et al.

APPEAL from the Circuit Court of Logan County ; the Hon. G. W. HERDMAN, Judge, presiding.

Statement by CONGER, J. In the fall of 1884 Harts and Foley contracted with Jacob Mangas to construct for them 100 corn plows at \$15.50 each, \$9 to be paid in cash and \$6.50 to be credited on the account Mangas owed them, such payments to be made as the plows were completed. Payments were made from time to time as the plows were completed. Some time in the spring of 1885 Mangas told appellants that the plows were in his way and he was told by Harts to rent a building called the Primm Building, which stood just across the alley running in the rear of the lot on which Mangas' shop stood. Mangas rented such building, but says he does not know that he told Primm at the time for whom he was renting. Seventy of the plows were completed, except they were not put together and had no shovels, and in such condition were stacked up in the Primm building. The other thirty had no shovels and lacked one coat of paint, which Mangas was to put on when the plows were sold or shipped, and in that condition were stacked up on the back end of Mangas' lot in a separate row or stack from any others, although there were other plows of a similar character on the back end of Mangas' lot near to those in controversy. Mangas says he remained in control of the Primm building and went in and out of it.

About the last of February, 1885, Mangas notified appellants that the plows were completed, when they went to his shop, went into the Primm building, counted the plows there, seventy in number, and thirty outside on the rear end of Mangas' lot, and settled with Mangas in full for the 100 plows.

For about three weeks in April and May, 1885, Mangas, by the authority of appellants, sold eighteen of these plows, taking notes (when cash was not paid) in his own name, and afterward assigning them to appellants. Appellants and Mangas testify that after the settlement in February the plows were considered by all of them to be the property of appellants.

While the property was in this condition appellees levied

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upon it as the property of Mangas by virtue of executions against him, and appellants seek to recover the property by writ of replevin.

The Circuit Court found that the property was liable to the debts of Mangas and that no sufficient delivery had been made to enable appellants to hold the property as to creditors of Mangas.

Mr. E. E. M. COCHRAN, for appellants.

Under a contract of sale, where nothing remains to be done on the part of the seller, in the way of ascertaining, appropriating, or delivering the property sold, the title to it, independently of the Statute of Frauds, immediately vests in the buyer, unless it can be shown that such was not the intention of the parties. *Townsend v. Hargraves*, 118 Mass. 325; *Lester v. East*, 49 Ind. 588; *Terry v. Wheeler*, 25 N. Y. 520; *Marble v. Moore*, 102 Mass. 443; *Thorndike v. Bath*, 114 Mass. 116; *Arnold v. Delano*, 4 Cush. 40.

The evidence clearly shows that appellants' plows were separated from all other plows, seventy of them being placed in a separate building rented by appellants, across the alley from the lots occupied by Mangas, and thirty tongues with axle attachment were stacked up in a row on the back part of Mangas' lots, near the Primm building. What better evidence could be offered to show the intention of the parties to vest the title in the appellants than counting, examining, receiving, separating and paying for the property? See *Straus v. Minzesheimer*, 78 Ill. 492, and cases there cited.

The appellants had the right, after they had taken possession of the plows and paid for the same, to employ Mangas to sell the plows for them, without thereby subjecting them to a lien in favor of the creditors of Mangas. *Wright v. Grover*, 27 Ill. 426.

The putting on of one coat of paint on a part of the plows had nothing to do with the determining the number, quality, identification, price or possession of the chattels, as all of that had been done before, and nothing remained to be done toward the completion of the contract. *Shelton v. Franklin*, 68 Ill. 333; *Bertelson v. Bower*, 81 Ind. 512.

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Messrs. BEACH & HODNETT, for appellees.

Even if, as between the vendor and vendee, the title to personal property has passed to the vendee, still there must be an actual delivery of the possession of the property to the vendee, and it must be removed, if capable of removal, to bind subsequent purchasers, or execution or attachment creditors. Thompson v. Willhite, 81 Ill. 356; Ticknor v. McClelland, 84 Ill. 471; Thompson v. Yeck, 21 Ill. 73; Curren v. Bernard, 6 Ill. App. 341; Lewis v. Swift, 54 Ill. 436; Thornton v. Davenport, 1 Scam. 296; Kitchel v. Bratton, 1 Scam. 300; Richardson v. Rardin, 88 Ill. 124; Updyke v. Henry, 14 Ill. 378; Burnell v. Robertson, 5 Gilm. 282; Lafever v. Mires, 81 Ill. 456.

The title to personal property does not pass to the purchaser, as between vendor and vendee, by virtue of the contract, until the contract is completed and nothing remains to be done under the agreement. Schneider v. Westerman, 25 Ill. 514; O'Keefe v. Kellogg, 15 Ill. 347; Frost v. Woodruff, 54 Ill. 155.

CONGER, J. We are inclined to think there was not such a delivery of the plows in question as would pass the title to appellants, as to the creditors of Mangas. "Any absolute sale of personal property which is of such a character as to be capable of being removed, where it remains with the vendor, is fraudulent in law as to creditors and subsequent purchasers, notwithstanding the sale may be in good faith and for an adequate consideration." Thompson v. Willhite, 81 Ill. 356; Ticknor v. McClelland et al., 84 Ill. 471.

The property was all capable of removal, and of being placed where no one would be misled as to the transfer of possession from Mangas to appellants. As we understand the rule *supra*, it means a removal which shall be visible and apparent to the world—one that shall apprise the public that there has been a change of possession.

Had the possession and control of the Primm Building been clearly in appellants, or some third party, the case would have been different. While Mangas and the appellants testify that

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such building was rented at their request, and doubtless as between themselves was so understood, yet, in fact, Mangas remained in control of it and there was nothing to apprise the public of anything to the contrary.

The same may be said of the plows stacked upon the rear end of Mangas' lot. To Mangas and the appellants their separation from the other plows might be quite apparent and sufficient for their purpose but it would not apprise strangers of any change of ownership or possession.

We think the judgment of the Circuit Court was right and it will therefore be affirmed.

Affirmed.

 ROBERT STUBBLEFIELD

V.

PELIG SOULE.

Landlord and Tenant—Action against Tenant for Breach of Covenants of Lease—Recoupment—Practice.

In an action on a lease against a tenant to recover damages for a breach of its covenants, the defendant may introduce, by way of recoupment under the general issue, evidence tending to show that the plaintiff had represented the roof to be in good condition, but that it was leaky and the defendant's goods were injured in consequence.

[Opinion filed August 26, 1886.]

IN ERROR to the Circuit Court of McLean County, the Hon. O. T. REEVES, Judge, presiding.

MESSRS. BLADES & NEVILLE, for appellant.

MESSRS. KERBICK, LUCAS & SPENCER, for appellee.

The rejected evidence amounts to a charge of fraud on the part of appellee in procuring the appellant to accept the lease

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and fraud as a defense must be pleaded. *Kirkland v. Lott*, 2 Scam. 13; *Anderson v. Jacobson*, 66 Ill. 522; *Elston v. Blanchard*, 2 Scam. 420; *Fitzpatrick v. Beatty*, 1 Gilm. 454; *Newell v. Supervisors*, 37 Ill. 253; *Klein v. Horine*, 47 Ill. 430; *Jones v. Albee*, 70 Ill. 34.

The evidence was not admissible under the general issue without notice, it not appearing and no claim being made that it went to appellee's entire cause of action. *McCullough v. Cox*, 6 Barb. 386; *Mayor v. Trowbridge*, 5 Hill, 68; *Whitbeck v. Skinner*, 7 Hill, 53; *Heaston v. Colgrove*, 3 Ind. 265; *Estep v. Morton*, 6 Ind. 489; *Sedgwick on Measure of Damages*, 435.

CONGER, J. This was an action by appellee upon a lease; the declaration averring that the premises described in the lease were in good repair when taken by appellant, and that they were injured by him while in possession, and that he did not trim the hedges and haul out the manure as he had covenanted to do in the lease. To this declaration a plea of the general issue was filed.

By way of recoupment under the general issue, the appellant proposed to prove "that the plaintiff represented to him before entering into the lease that the roof of the dwelling house was in good condition, and that it was not and that plaintiff knew it was not, and that on account of the leaky condition of the roof the furniture and carpets of the defendant were damaged, and that on account thereof the plaintiff was obliged to move out of the house, and did move out about the first of January before the expiration of the lease."

Upon objection being made by appellee the court excluded this evidence, and as we think, erroneously.

In *Stow v. Yarwood*, 14 Ill. 424, which was an action of trover, the plea was, as in this case, the general issue, and the court say: "The principle deducible from the adjudged cases is, that mutual demands arising out of the same subject-matter and capable of being balanced against each other, may be adjusted in one action. One demand is considered as reduced or liquidated by the other, and the surplus is regarded as the

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real cause of action. This doctrine of recoupment tends to promote justice and prevents needless litigation. It avoids circuity of action and a multiplicity of suits. A claim originating in contract may be set up against one founded in tort."

If appellee falsely represented to appellant that the roof of the dwelling house was in good condition when it was not, and appellant was thereby damaged, such damages, in our opinion, could be recouped in the present action. *Borroughs v. Clancy*, 53 Ill. 30.

It would reduce or liquidate the demand of appellee to the extent that such damages might be allowed, and would therefore be proper under the general issue. *Babcock v. Trice*, 18 Ill. 420; *Murray v. Carlin*, 67 Ill. 286; *Cooke v. Prebble*, 80 Ill. 381.

For the error in excluding this evidence, the judgment of the Circuit Court will be reversed and the cause remanded.

Reversed and remanded.

CITY OF SPRINGFIELD

V.

CITY OF LONDON INSURANCE COMPANY.

Special Tax on Insurance Companies—Power of Municipalities to Levy—Statutes—Repeal—Office of Proviso.

¶ 111, Sec. 23, Ch. 24, Starr & C. Ill. Stat., authorizing municipalities having fire departments to tax foreign insurance companies, is repealed by ¶ 32, Sec. 30 Ch. 73, such power being saved only to municipalities to which it has been expressly granted by statute.

[Opinion filed August 26, 1886.]

APPEAL from the Circuit Court of Sangamon County; the Hon. JAMES A. CREIGHTON, Judge, presiding.

Statement of the case by CONGER, J. This is an action of debt by the city against a fire insurance company not incorpo-

rated under the laws of Illinois, to recover two per cent. upon the gross receipts of the company for the year 1885. The declaration contains two counts, both making proper allegations as to the defendant being a foreign fire insurance company, and that it did business in the city in 1885 of \$5,000 in premiums, and that during all of that time and for many years before, the city kept and maintained an organized fire department. The city is incorporated under the general law.

The first count avers that by an ordinance of the city then (1885) and still in force, it was provided that foreign insurance companies engaged in effecting fire insurance in said city should pay into the city treasury two dollars upon the hundred dollars, and at that rate upon the amount of all premiums paid or agreed to be paid for insurance in said city, payments to be made on January and July 1st each year, and that the sums so received should be set apart for the support and maintenance of the fire department of said city.

The second count avers that previous to 1885 the city levied upon the gross receipts of all such companies a tax or license fee of two dollars upon the hundred of premiums, to be paid January and July 1st each year, to be devoted exclusively to the support of the fire department.

Both counts allege the premiums were the gross receipts, and both allege the failure of the company to pay.

A general demurrer was interposed to the declaration and sustained, and the city electing to stand by it, judgment was rendered against the city for costs.

MESSRS. GREENE, BURNETT & HUMPHREY, for appellant.

MR. JAMES C. CONKLING, for appellee.

CONGER, J. We are of opinion that the action for the two per cent. of the gross receipts of the insurance company can not be maintained for the reason there is no existing law justifying it.

In the general law there was formerly a provision (Chap. 24, Sec. 111, Starr & Curtis,) which declared that "All corpo-

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rations, companies or associations, not incorporated under the laws of this State, engaged in any city in effecting fire insurance, shall pay to the treasurer the sum of \$2 upon the \$100 of the net receipts by their agency in such city, and at that rate upon the amount of all premiums which, during the half year ending on every first day of July and January, shall have been received for any insurance effected or agreed to be effected, in the city or village, by or with such corporations, companies or associations respectively. * * * Provided, that this section shall only apply to such cities and villages as have an organized fire department, or maintain some organization for the prevention of fires." This is the only authority we have been able to find justifying the city in passing the ordinance in question, and this is unquestionably repealed and abrogated by Sec. 30 of Chap. 73, passed in 1879, and in force July 1, 1879.

This section provides that "Every agent of any insurance company * * * shall return to the proper officer * * the amount of the net receipts of such agency for the preceding year, which shall be entered on the tax list * * * and subject to the same rate of taxation, for all purposes, State, county, town and municipal, that other personal property is subject to at the place where located; said tax to be in lieu of all town and municipal licenses, and all laws and parts of laws inconsistent herewith are hereby repealed: *Provided*, that the provisions of this section shall not be construed to prohibit cities having an organized fire department from levying a tax, or license fee, not exceeding two per cent., in accordance with the provisions of their respective charters, on the gross receipts of such agency, to be applied exclusively to the support of the fire department of such city."

It is clear to us that the intention of the Legislature in the Act of 1879 was in lieu of every species of municipal tax or license, to subject the net receipts of insurance companies of the agency within the county, town or municipality, to the same rate of taxation as other personal property.

But it is insisted that the provision to this section gives the power to all cities, having an original fire department, to levy

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a tax or license fee of two per cent. on the gross receipts of the agency.

We cannot assent to this view. In *Minis v. U. S.*, 15 Pet. 433, it is said: "The office of a provision is, generally, either to except something from the enacting clause, or to restrain its generality, or to exclude some possible ground of misinterpretation of it, as extending to cases not intended by the Legislature to be brought within its purview." In *Boon v. Joliet*, 1 Scam. 258, it is said: "A provision in a statute is intended to qualify what is affirmed in the body of the act, section or paragraph preceding it."

We hold that Sec. 30 of Chap. 73 repealed Sec. 110 of Chap. 24, and the provision at the end of Sec. 30 only has the effect to save the power of levying the two per cent. upon gross receipts, "in accordance with the provisions of their respective charters," and is to be construed as saving such power only to those cities whose charters had a special power of the kind in them at the time of the passage of the act; but it was not intended to create or confer such a power upon other cities. In other words, it saved the power to those municipalities expressly having it by their charters, but did not confer it upon others.

The judgment of the Circuit Court will be affirmed.

Affirmed.

THE NORTHWESTERN BENEVOLENT AND MUTUAL AID ASSOCIATION OF ILLINOIS

v.

SARAH W. BLOOM.

Life Insurance—Suicide—Construction of Application and Certificate Together as one Instrument—Pleading.

1. In an action brought on a certificate or policy of life insurance, the assured having committed suicide, it is held that the application, containing a stipulation excepting death from suicide from the risk, must be construed with the certificate as one instrument.

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2. An allegation that the assured "did then and there immorally, wrongfully and wickedly" commit suicide, is substantially an allegation that he committed the act while sane.

[Opinion filed August 26, 1886.]

APPEAL from the Circuit Court of Adams County; the Hon. WILLIAM MARSH, Judge, presiding.

MESSRS. CARTER & GROVER and T. B. PAPE, for appellant.

The agreements contained in the application are made warranties by the clause in the certificate referring to them. Bliss on Life Ins. 85, and cases cited in note 2; Kelsey v. Universal L. Ins. Co., 35 Conn. 225; Fame Ins. Co. v. Thomas, 10 Ill. App. 545; S. C., 103 Ill. 91; Miles v. Conn. Mut. L. Ins. Co., 3 Gray, 580.

If they should be considered representations, they are as a matter of law made conclusively material. Fame Ins. Co. v. Thomas, 10 Ill. App. 545; Price v. Phoenix Mut. L. Ins. Co., 17 Minn. 497; S. C., 10 Am. Rep. 166; Campbell v. New Eng. Mut. L. Ins. Co., 98 Mass. 381; Jeffries v. Life Ins. Co., 22 Wall. 47.

The failure to perform a material promissory representation avoids the policy. Schultz v. Mut. L. Ins. Co., 6 Fed. Rep. 672; Houghton v. Manufacturers Mut. L. Ins. Co., 8 Met. 114; Clark v. Manufacturers Ins. Co., 8 How. 235; Kimball v. Ætna Ins. Co., 9 Allen, 540; Blumer v. Phoenix Ins. Co., 45 Wis. 622; S. C., 48 Wis. 535; S. C., 33 Am. Rep. 830.

The language of the certificate makes the performance of the agreements in the application a condition precedent to the enforcement of the contract. Schultz v. Mut. L. Ins. Co., 6 Fed. Rep. 672; See also Insurance Co. v. Trefz, 104 U. S. 197.

Where two instruments are executed as parts of the same transaction, whether at the same or different times, they will be taken and construed together as one instrument. Neil v. Chessen, 15 Ill. App. 266; Hunt v. Frost, 4 Cush. 54; Stacy v. Randall, 17 Ill. 467; Gardt v. Brown, 113 Ill. 475; Torrence v. Shed, 112 Ill. 466.

The application in this case is not merged in the certificate of membership, but together with that forms the contract of insurance. It contains the agreements entered into by the insured, while the certificate contains the obligations assumed by the benevolent association. *Supreme Council of Royal Templars of Temperance v. Curd*, 111 Ill. 284; *Caffery v. John Hancock L. Ins. Co.*, 17 Fed. Rep. 25; *Grattan v. Metropolitan L. Ins. Co.*, 92 N. Y. 274; *Blooming Grove Mut. F. Ins. Co. v. McAnerney*, 102 Pa. St. 335.

Sanity will be presumed, and if insanity be relied on to avoid the consequences of suicide, it must be pleaded and proved. *Weed v. Mut. Ben. L. Ins. Co.*, 70 N. Y. 561; *Phadenhauer v. Germania L. Ins. Co.*, 7 Heisk. 567; S. C., 19 Am. Rep. 623; *Knickerbocker L. Ins. Co. v. Peters*, 42 Md. 414.

The contract sued on in this case is a contract with the insured, and not with the beneficiary. *Highland v. Highland*, 109 Ill. 366; S. C., 13 Ill. App. 510; *Johnson v. Van Epps*, 110 Ill. 551; S. C., 14 Ill. App. 201.

The beneficiary is bound by all of the covenants and agreements contained in the contract. *Caffery v. John Hancock Mut. L. Ins. Co.*, 27 Fed. Rep. 25; *Fitch v. Am. Pop. L. Ins. Co.*, 59 N. Y. 557.

Mr. J. F. CARROTT, for appellee.

The plaintiff need not aver the truth of statements contained in the application. *Herron v. Peoria Mar. and F. Ins. Co.*, 28 Ill. 235; *M. B. L. Ins. Co. v. Robertson*, 59 Ill. 123; *Piedmont Ins. Co. v. Ewing*, 92 U. S. 377.

The plaintiff need not aver the performance or non-performance of conditions subsequent. *Forbes v. Am. Mut. L. Ins. Co.*, 15 Gray, 249; *Ætna Ins. Co. v. Phelps*, 27 Ill. 71.

Nor the performance or non-performance of negative prohibited acts. *Hunt v. Hudson Riv. F. Ins. Co.*, 2 Duer, 481; *Troy F. Ins. Co. v. Carpenter*, 4 Wis. 20.

Nor need he allege that he is within the excepted risks. *Lounsbury v. Protection Ins. Co.*, 8 Conn. 458; *Ferrer v. Home Mut. Ins. Co.*, 47 Cal. 416.

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The certificate contains no warranty. The authorities define a warranty in insurance to be a part of the contract, evidenced by the policy, and a binding agreement that the facts stated are strictly true. 1 Phil. on Ins., 5th Ed., Secs. 754, 756; Flanders on Ins., 204-5.

To constitute a warranty it must be contained in the policy; or if contained in another instrument it must be made part of the policy by the agreement contained in the policy. Wall v. Howard Ins. Co., 14 Barb. 383.

A representation in insurance may, for the purpose of this case, be defined to be a statement in regard to a material fact made by the applicant for insurance to the insurer, with reference to a proposed contract of insurance. 1 Phil. on Ins., Sec. 524 *et seq.*

As representations simply, they are not a part of the contract of insurance. Flanders on Ins., 201, and cases cited; Campbell v. New Eng. Mut. L. Ins. Co., 98 Mass. 381.

A representation is of some matter extrinsic to the contract, and generally, if not always, relates to the present state and condition of the subject insured. Alston v. Mechanics Mut. Ins. Co., 4 Hill, 330.

A stipulation or representation relied upon as a warranty should either be written in the policy, or expressly made a part of it; for the policy is the only legal evidence of what the contract is. Dow v. Whetten, 8 Wend. 160; Jennings v. Chenango Co. Mut. Ins. Co., 2 Den. 75; Am. Life Ins. Co. v. Day, 39 N. J. L. 89; M. B. L. Ins. Co. v. Robertson, 59 Ill. 123.

CONGER, J. On the 3d day of March, 1882, Lewis H. Bloom made application for a certificate of membership in the appellant company upon one of the printed forms prepared by the company, which, after giving a number of answers as to the condition of his health, family, etc., contained the following claim: "It is expressly stipulated and agreed that the foregoing application and declaration shall be the basis of the contract between the above named applicant and the Northwestern Benevolent and Mutual Aid Association of

Illinois, said contract not to be in force or binding upon the association until after the payment of the membership fee and the approval of the application by the medical director, and that if any misrepresentations or fraudulent or untrue answers have been made, or any facts which should have been stated have been suppressed, if death should result from suicide, or if he or she shall omit, neglect or refuse to pay any of the assessments on or before the day on which they shall fall due then, and in either event, this agreement shall be null and void, and all money which shall have been paid shall be forfeited to the association."

(Signed)

"Lewis H. Bloom."

Upon this application, on March 8, 1882, the association issued a certificate of membership providing for the payment within sixty days after the death of said Bloom, to his wife, Sarah W. Bloom, appellee herein, \$2,000.

The said certificate or policy contained this clause: "This certificate is issued upon the condition that the said Lewis H. Bloom shall comply with the constitution and by-laws of the association, and that the statements in the application for this certificate are true."

Bloom died and his wife brought suit upon the certificates and to the declaration appellant filed eight special pleas, setting up in a variety of ways, as a defense to the action, the suicide of Lewis H. Bloom.

In the first special plea the language in which the suicide is charged, is, "Did wrongfully, and to the injury of the defendant, commit suicide." In the second, "He, the said Lewis H. Bloom, committed suicide, and the death of him, the said Lewis H. Bloom, did then and there result from said suicide." In the third the language is, "Did then and there, immorally, wrongfully and wickedly, for the purpose of destroying his life, strangle himself by means of hanging himself by the neck until he was dead." In the sixth and seventh, the language is, "Wrongfully, wickedly and fraudulently, and of his own volition, committed suicide."

The eighth special plea sets forth the clause above quoted of the application, avers it to be a part of the contract of in-

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surance, and a part of the policy or certificate, and concludes with the charge of suicide upon the part of Bloom.

A demurrer was filed to all these pleas and sustained by the court; appellant refusing to answer further judgment was rendered against it for \$2,162.20. It is claimed by appellee, "that the application not being incorporated into the certificate, and not being expressly referred to in it, so as to make it a part and parcel thereof, should not be considered in construing the contract between these parties."

We are of opinion that the application and certificate were executed as parts of the same transaction; that they should be taken and construed together as one instrument, and that the true nature of the contract entered into can be determined only by considering the mutual undertaking of both parties as set forth in both. *Stacy v. Randall*, 17 Ill. 467.

In the language of *Royal Templars of Temperance v. Curd*, 111 Ill. 288, "the first part of this contract—the part obligatory upon the beneficiary—is the application of Lewis H. Bloom."

It is plain and simple in its language, and can not be misunderstood. It contains this: "It is expressly stipulated and agreed that the foregoing application and declaration shall be the basis of the contract, * * * that if death should result from suicide * * * then this agreement shall be null and void." What agreement is meant? Certainly not the application, for that is not in itself a contract but simply a proposal on the part of Bloom. The agreement that is to become null and void in case of suicide by Bloom is the mutual and entire contract of insurance entered into by both parties, and set forth and contained in both the application and certificate.

Neither is it important to determine whether the performance of the agreement, contained in the application, not to commit suicide, is or is not a condition precedent to the enforcement of the contract. Appellant is not now relying upon that point even if true, nor complaining because the declaration does not aver a compliance with the provision, but by its pleas, itself brings it forward and sets it up as a defense.

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It is also objected that none of the pleas expressly allege that Bloom committed suicide when sane. We are inclined to think, however, that after construing the language used by the pleader most strongly against him, there can be no reasonable doubt as to the meaning upon this point of the third, sixth and seventh pleas.

In the third, the language is, "Did then and there immorally, wrongfully and wickedly" and in the sixth and seventh, "Wrongfully, wickedly and fraudulently, and of his own volition, commit suicide."

These expressions can not properly be used in reference to the act of an insane man. One whose reason is dethroned, and who is acting from an insane delusion, does not act immorally, wrongfully, wickedly or fraudulently. We think these pleas do substantially, and not merely argumentatively, allege that Bloom committed suicide when sane, and in his right mind, and therefore do allege such a violation of the contract as, by its terms, renders it null and void.

We think the Circuit Court erred in sustaining the demurrer to these pleas, and the judgment of the Circuit Court will therefore be reversed and the cause remanded.

Reversed and remanded.

MARGARET FOSTER

v.

HENRY C. LATHAM.

21	165
102	331

Certificate of Acknowledgment—How far Conclusive—Surplusage—Holder of Notes Secured by Trust Deed as Trustee.

1. In the absence of proof of fraud and collusion on the part of the officer taking and certifying the acknowledgment of a deed, his certificate in proper form must prevail over the unsupported testimony of the grantor that the same is false and forged.

2. The use of the word "notarial" before the word "seal," in a certificate of acknowledgment of a Justice of the Peace, is surplusage, and does not invalidate the certificate.

3. The holder of notes secured by a trust deed may be the trustee therein.

Foster v. Latham.

[Opinion filed August 26, 1886.]

IN ERROR to the Circuit Court of Sangamon County; the Hon. J. J. PHILLIPPS, Judge, presiding.

MESSRS. ORENDORFF & PATTON, for plaintiff in error.

The evidence does not warrant the master in chancery in finding that Margaret Foster ever executed the trust deed in question to Henry C. Latham.

In proof that she did, complainant relies solely upon the recitals of the notary public, John D. Keedy. There is no proof that he was at the time such an officer. There is no seal of any such officer attached. Surely such a recital, unauthenticated by a seal, can not prove the execution of said instrument or deed. Margaret Foster, not being proven to have ever waived her homestead and dower right, ought not to have had her rights foreclosed under this trust deed. *Holbrook v. Nichol*, 36 Ill. 161.

A trustee is agent of both *cestui que trust* and beneficiary. 2 Perry on Trusts, 156; *Clarke v. Wilson*, 53 Miss. 119; *Ashuelot R. R. Co. v. Elliott*, 57 N. H. 397; *McGovern v. Knox*, 21 Ohio St. 547; *Jones on Mortgages*, Secs. 1770, 1771.

He can not acquire interests hostile to the interests of the *cestui que trust*. *Lee v. Fox*, 6 Dana, 172; *Chapin v. Weed*, 1 Clark, 464; *G., C. & S. R. R. Co. v. Kelly*, 77 Ill. 426.

A trustee in a deed of trust for security is subject to the same rules that govern all trustees. *Perry on Trusts*, Sec. 602.

MESSRS. MATHENY & MATHENY, for defendant in error.

The word "notarial" is surplusage, and surplusage in an acknowledgment otherwise perfect will not vitiate. *Stuart v. Dutton*, 39 Ill. 91.

A certificate of acknowledgment is stronger as evidence than the denial of the grantor. *Lickmon v. Harding*, 65 Ill. 505; *Canal & Dock Co. v. Russell*, 68 Ill. 426; *Kerr v. Russell*, 69 Ill. 666; *Russell v. Baptist Theo. Union*, 73 Ill. 337; *Fitzgerald v. Fitzgerald*, 100 Ill. 385.

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A certificate of acknowledgment is stronger even than the denial of the grantor with proof that the deed is not in his handwriting. *Kerr v. Russell*, 69 Ill. 666; *Blackman v. Hawks*, 89 Ill. 512; *Tunison v. Chamblin*, 88 Ill. 378.

A certificate of acknowledgment is a record and imports verity. *Kerr v. Russell*, 69 Ill. 666; *Blackman v. Hawks*, 89 Ill. 512.

It seems to be held in the following cases that a certificate of acknowledgment can only be impeached by showing fraud or collusion between the party and the officer, and that a simple negative of the facts therein stated will not avail. *Graham v. Anderson*, 42 Ill. 514, 519; *Kerr v. Russell*, 69 Ill. 666; *Strauch v. Hathaway*, 101 Ill. 11; *Monroe v. Poorman*, 62 Ill. 523.

There is no such an inconsistency between the position of the defendant in error as holder of the notes on the one hand, and as trustee on the other hand, that the courts will refuse him relief.

Had the loan originally been made for a third party, it would have been lawful for Latham to purchase the notes secured by this deed. *Darst v. Bates*, 95 Ill. 493.

CONGER, J. This was a bill filed by Latham to foreclose a trust deed which is claimed in the bill to have been executed by plaintiff in error and her husband, Henry Foster, to defendant in error, as trustee, to secure a series of notes executed by said Henry Foster, payable to himself and afterward indorsed to Latham. Latham furnished the money for which the notes were given and it was used by Foster and his wife in discharging a prior incumbrance upon the same property, upon which the deed of trust in suit was given. Plaintiff in error answers, denying the execution or acknowledgment upon her part of the trust deed.

The evidence upon this point is the certificate of acknowledgment of John D. Keedy, a Justice of the Peace, certifying in the usual form to the execution of said deed of trust by plaintiff in error and her husband, offered by defendant in error, and the testimony alone of plaintiff in error, offered in

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her own behalf, that she never executed or acknowledged the said deed of trust.

We had supposed it was settled beyond controversy by the Supreme Court of this State that "in the absence of proof of fraud and collusion on the part of the officer taking and certifying the acknowledgment of a deed, the officer's certificate of the acknowledgment in proper form must prevail over the unsupported testimony of the party grantor that the same was false and forged." *Lickmon v. Harding*, 65 Ill. 505; *Fitzgerald v. Fitzgerald*, 100 Ill. 385.

The certificate of acknowledgment is as follows :

"State of Illinois, Sangamon County.

I, John D. Keedy, Justice of the Peace in said county, do hereby certify that Henry Foster and Margaret Foster, his wife, personally known to me to be the same persons whose names subscribed to the foregoing instrument, appeared before me this day in person and severally acknowledged that they signed, sealed and delivered said instrument as their free and voluntary act, for the uses and purposes therein set forth, including the release and waiver of the right of homestead and dower.

Given under my hand and *notarial* seal this 20th day of July, A. D. 1878.

[SEAL.]

JOHN D. KEEDY,
Justice of the Peace."

And it is insisted that this is the certificate of a notary, and not a good certificate because there is no notary's seal attached. There is no force in the objection. The use of the word "notarial" is mere surplusage, and does not invalidate the certificate.

The next objection taken is that Latham could not be a trustee and *cestui que trust* by the same instrument.

We do not think this objection is well taken. In *Longwith v. Butler*, 3 Gil. 38, the court quotes with approval the following language of Lord Eldon: "Here the mortgagee is himself made the trustee. It would have been more prudent for him not to have taken upon himself that character. But it is too much to say that if one party has so much confidence in

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the other as to accede to such an arrangement, this court is, for that reason, to impeach the transaction." Justice Koerner proceeds to hold that a mortgagee under a mortgage containing a clause to sell, may sell the mortgaged premises and convey a good title to the purchaser.

In the case of *Darst v. Bates et al.*, 95 Ill. 513, the court say: "Indeed, it is quite common to make the holders of the notes or their assignees trustees in mortgages with powers of sale, and this has repeatedly received the approval of this court."

Here it is not sought by the trustee to avail himself of the power contained in the deed to sell, but he is asking a court of equity to take charge of the property and order it sold in the usual way.

The decree of the Circuit Court was in our opinion right, and will be affirmed.

Affirmed.

GEORGE H. DENNIS

V.

JOHN W. PIPER.

Negotiable Paper—Suit by Surety on Note Given to Indemnify Him—Fraud and Circumvention—Notice—Pleading.

1. A plea of fraud and circumvention in procuring a note, from which it appears that the surety was not deceived as to its character or amount and in which it is alleged that certain representations as to what future circumstances might create a liability were false, is bad on demurrer.

2. One of two notes, made by the same principal, was given to indemnify the surety on the other note. In an action by said surety on the note payable to him, it is held that a plea to the effect that the plaintiff failed to give the statutory notice to the payee of the other note, is bad on demurrer, the defendant not having requested the plaintiff to give such notice.

3. The payment of interest already due on a note constitutes no consideration for its extension.

4. The language of a plea must be construed most strongly against the pleader.

Dennis v. Piper.

[Opinion filed August 26, 1886.]

APPEAL from the Circuit Court for Greene County; the Hon. GEO. W. HEEDMAN, Judge, presiding.

Messrs. W. M. WALLACE and JAMES R. WARD, for appellant.

Mr. W. M. WARD, for appellee.

CONGER, J. This was an action of *assumpsit* on a note for \$650, dated October 6, 1882, payable to appellee and signed by one O. R. Southworth, and appellant. To the declaration, appellant filed a plea of *non assumpsit*, upon which issue was joined, and three special pleas. The second plea was as follows:

2d. Plea by defendant, George H. Dennis, alleging that the causes of action in plaintiff's declaration were one and the same, to wit, the note sued on; that John W. Piper, the payee, and O. R. Southworth, the principal maker, obtained from him the same by the use of fraud and circumvention; that Piper and Southworth before the execution of said note, on, to wit, October 6, 1882, colluding together to injure and defraud him, the defendant, falsely and fraudulently represented to him that if he (Dennis) would execute the said note sued on, as surety, that he (Dennis) would only be liable thereon in case of a failure on the part of said Piper to pay another note for \$650, which Piper had signed as surety for Southworth and payable to B. B. Bartholomew, of the same date, to wit, October 6, 1882, and that the note in the declaration mentioned was for the purpose of indemnifying Bartholomew from loss in case of a failure to make the amount payable to him, out of the said Southworth, principal, and Piper, the surety; that he (Dennis) signed the note as surety for the purpose of collaterally securing the payment to Bartholomew of the note signed by Southworth and Piper; and that it was agreed and understood by and between Piper, Southworth and himse'f, that he (Dennis) was to be liable on the note sued on only in case

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of the failure of Piper to pay Bartholomew the note Southworth and Piper had executed to Bartholomew, and that Piper had afterward on, to wit, August 6, 1885, paid to Bartholomew the amount of said note.

This is not a good plea of fraud and circumvention. "A fraud in obtaining a note may consist of any artifice practiced upon a person to induce him to execute it, when he did not intend to do such an act. It is not fraud which relates to the quality, quantity, value or character of the consideration that moves the contract, but it is such a trick or device as induces the giving of one character of instrument under the belief that it is another of a different character, such as giving a note or other agreement for one sum or thing, when it is for another sum or thing, or as giving a note under the belief that it is a receipt." *Latham v. Smith*, 45 Ill. 25.

It is not alleged in this plea that appellant was in any way deceived in reference to the instrument he signed, either as to its character or amount, but only that there were false representations made as to what future circumstances might create a liability upon the note, which could only be made available in a different plea from the one here presented.

The third plea was as follows:

3d. Plea by George H. Dennis, defendant, alleging that the note sued on was given as collateral security for a note maturing at the same time and of the same date and amount as the note sued on; that O. R. Southworth was principal, and plaintiff, Piper, was surety on the other note; that the principal maker, Southworth, on August 6, 1883, at maturity of said note, had sufficient property free from all incumbrances and exemptions to have paid said other note, and that had the surety, Piper, given to the payee of said other note proper notice to bring suit on said other note at the maturity thereof, and used any diligence to secure the payment of said other note to the payee thereof, that said Piper would have been lawfully released from the payment of said other note, which release of said Piper would have released him, Dennis, from the note sued on, and that although the said Piper could have been released as aforesaid from the payment of said other note by the

Dennis v. Piper.

use of ordinary diligence as aforesaid, yet he failed wholly, wilfully, fraudulently and negligently so to do, to the great and needless damage of defendant, (Dennis); that he (Dennis) was wholly powerless to compel said plaintiff, Piper, to give said notice, and because he was thus powerless and unable to compel plaintiff to take proper steps to release both plaintiff and defendant (Dennis) from their respective notes, and because the plaintiff has in this respect acted in bad faith toward defendant, when he could and should have kept defendant harmless, he, the defendant, became thereby released from all liability on said note, and that two years after said other note became due, to wit, August 6, 1885, the principal, Southworth, became and is now insolvent, and that by the negligence of the plaintiff it is impossible to recover anything from said Southworth, the principal maker of both notes.

This plea presents no defense. Piper would not be required to give the statutory notice to Bartholomew to bring suit unless requested by Dennis.

Dennis had it in his power to compel Piper to sue Southworth and himself upon this note now in suit had he desired to give the proper notice to Piper, and the amount could have been made, according to the showing of the plea, out of the principal, Southworth, and thus released all the sureties. The fourth plea is as follows:

4th. Plea by defendant, George H. Dennis, alleging that the whole consideration of the note sued on was for the benefit of the principal maker, Southworth, and no part was for the benefit of defendant, Dennis; that he (Dennis) was surety on said note; that the plaintiff knew the aforesaid facts at the time of the execution and delivery of said note; that after the maturity of said note, on August 6, 1883, the plaintiff, for a valuable and binding consideration, to wit, \$52, as interest, then and there paid to him by said Southworth, contracted and agreed then and there with said Southworth to extend the time for the payment of said note, and did then and there as aforesaid, for the consideration aforesaid, extend the time of the payment of said note until the 6th day of August, 1884, to the said Southworth, without the knowledge or consent of

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defendant (Dennis), and that said Southworth did then and there at the maturity of said note agree to keep the money one year longer as aforesaid, at the same rate of interest, and that afterward, on August 6, 1884, the plaintiff, without the knowledge or consent of the defendant (Dennis), did a second time especially contract and agree with said Southworth, for a valuable consideration, the further sum of \$52 to him paid as interest, to extend the time of payment of said note from August 6, 1884, to August 6, 1885, and that said Southworth did then and there agree to keep said money at the same rate of interest from August 6, 1884, to August 6, 1885, for the consideration aforesaid, and that the plaintiff did then and there a second time extend the time of payment of said note as aforesaid, without the knowledge or consent of defendant (Dennis).

The pleas aver that in consideration of the payment of \$52 interest paid by Southworth, Piper agreed to extend the time of payment of the note, but it does not aver that this \$52 was not for interest then or past due, and applying the rule of construing the language of a plea most strongly against the pleader, it is not an unreasonable construction of the language used, to say it means interest then due upon the note, and if this is its meaning the plea is fatally defective. The performance by Southworth of a legal obligation then resting upon him could not form the consideration of a new undertaking upon the part of Piper. It is the payment of interest in advance that will constitute a consideration to support and enforce an extension. *Waters v. Simpson et al.* 2 Gil. 570; *Warner v. Campbell*, 26 Ill. 280.

Neither is it averred in the pleas that the agreement on the part of Southworth to keep the money for a year longer was any part of the consideration upon which Piper's agreement to extend the time was based, but both extensions are distinctly based upon the consideration of the sum of \$52 to him, Piper paid as interest.

We think the court properly sustained the demurrer to these pleas, and the judgment of the Circuit Court will be affirmed.

Affirmed.

 Ill. Agricultural Co. v. Cranston et al.

21	174
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ILLINOIS AGRICULTURAL COMPANY

V.

J. CRANSTON ET AL., HIGHWAY COMMISSIONERS.

Action against Highway Commissioners—Extent of Recovery—Instructions—Practice—Motion to Exclude Plaintiff's Evidence.

1. In an action against Highway Commissioners to recover damages resulting from acts done in their official capacity, the plaintiff can not recover against one of the defendants for an act done in his personal capacity, and not directed or assented to by the Board.

2. Where the evidence was conflicting and the case was properly presented to the jury, this court will not disturb the verdict.

3. The trial court may properly refuse to give a large number of unobjectionable instructions where the case only requires a few clear and brief ones.

4. After a motion to exclude the plaintiff's evidence has been overruled in part, the defendant may be permitted to introduce evidence in defense.

5. This court will not interfere with the judgment of the court below, unless it clearly appears that substantial error has been committed, to the injury of the appellant.

[Opinion filed August 26, 1886.]

APPEAL from the County Court of Champaign County; the Hon. J. W. LANGLEY, Judge, presiding.

Messrs. E. L. SWEET, F. M. WRIGHT and GERE & BEARDSLEY, for appellant.

Mr. J. L. RAY, for appellee.

Per Curiam. The cause of action alleged here was that the defendants in their official capacity as Highway Commissioners, so wrongfully and negligently graded and ditched certain highways as to divert improperly the surface and rain water, etc., upon the lands of the plaintiff, causing the same to flow in a direction and with a force different and greater than it would otherwise have done, whereby the plaintiff was damaged, etc.

One question of some difficulty and upon which complaint is now made as to the ruling of the court is, whether the plaintiff can recover against one of the defendants for an act of the nature set out in the declaration, but not done in his official capacity, nor recognized nor approved by the others, or either of them.

The trial court held that no recovery could be had for any such act not concurred in by a majority of the defendants, and that only those so concurring in and responsible for the act could be made liable. The question is not wholly free from doubt, but we are disposed to agree with this view.

The declaration seems to have been framed for the purpose of testing the liability of defendants for acts done by them in their official capacity. It would not be competent, under such a declaration, to recover against one alone for an act done in his personal capacity not directed or assented to by the Board. It is, of course, true that in actions for tort the verdict may be against a part or all of the defendants, but it must appear that those who are convicted are guilty of the act set out in the declaration, or so much of it as will be necessary to constitute a cause of action.

Upon the main question whether the plaintiff was injured as alleged by the act of defendants there was conflict in the testimony. We see no sufficient reason for saying the verdict, which was for the defendants, is against the evidence.

The instructions given by the court stated the law with sufficient accuracy, and while a great number asked by the plaintiff were refused, to some of which no particular objection can be urged, yet we find that in those given was laid down all that was necessary to advise the jury of the legal principles involved. It would have been unwise to give all the instructions, twenty-eight in number, asked by the plaintiff, if they had all been good. A few clear, brief propositions were all the case required. Sundry exceptions were saved to the rulings of the court during the trial.

Among others now urged is that the defendants having moved to exclude the evidence of plaintiff, and being overruled, were permitted to offer testimony in defense. Strictly

Powell v. Ashlock.

speaking, the motion which was interposed at the close of plaintiff's case was to exclude certain items of the plaintiff's evidence and to make it broad enough to cover what he was endeavoring to indicate. Counsel said he would move to exclude all. Pending the argument, plaintiff amended the declaration and the court excluded some of the evidence, but denied the motion as to the residue, and permitted defendants to proceed with their defense. Even if the motion can be considered as an oral demurrer to the evidence we hold the court might, in its discretion, have allowed the defense to be made. Other objections have been argued which we deem it not necessary to refer to in detail. The case mainly depended upon questions of facts which were examined very fully before the jury, and unless it were quite clear that substantial error had been committed to the prejudice of the appellants this court ought not to interfere.

The judgment will be affirmed.

Affirmed.

JOHN W. POWELL, ADMINISTRATOR,
V.
R. WHARTON ASHLOCK.

Claim of Surety Against an Estate—Practice.

In a case where the question at issue is mainly one of fact, this court affirms the judgment of the court below, allowing the claim of a surety against an estate, upon a review of the record, without stating the case and its reasons at length.

[Opinion filed August 26, 1886.]

APPEAL from the Circuit Court of Greene County; the
Hon. GEORGE W. HERDMAN, Judge, presiding.

Mr. JAMES R. WARD, for appellant.

Wheeler v. Mortland.

Mr. JOHN G. HENDERSON, for appellee.

Per Curiam. This was a claim against the estate of W. C. English, deceased, for money paid by the plaintiff as his surety. The claim was allowed for \$230.25. The main question in the case is one of fact. The transactions upon which the claim is based were numerous and quite complicated, and the plaintiff had some difficulty in eliciting the testimony. In order to state the case with such fullness as to make it intelligible to those not familiar with it, considerable space would be required and no useful purpose would be subserved thereby.

After an examination of the record and considering the printed arguments of counsel, we are satisfied the claim is just and should be paid by the estate. We find no error in the record, and the judgment will be affirmed.

Affirmed.

NORA WHEELER
v.
WILLIAM MORTLAND.

Life Insurance—Surrender of Wife's Policy by Husband—Equity Jurisdiction.

Where the husband surrenders a policy of insurance on his life, payable to his wife, to the insurance company, in exchange for a policy in favor of his children, and upon his death payment of the latter policy is made to the guardian of the children, the widow can not maintain a bill against the guardian for the amount of the policy, as a court of equity is without jurisdiction, and there is no privity between the parties.

[Opinion filed August 26, 1886.]

APPEAL from the Circuit Court of Calhoun County; the Hon. GEORGE W. HERDMAN, Judge, presiding.

MESSRS. GREATHOUSE & BROWN, for appellant.

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Mr. T. J. SELBY, for appellee.

The contract of insurance was between the association and Arthur W. Argust, and is not such a case as comes within the provisions of Sec. 54 R. S. (1874), 607.

The first policy was surrendered back to the association and subsequently another policy taken out for the benefit of the Argust children. The latter contract was also between the association and Arthur W. Argust, and appellee contends that the insured had full right to make such contract at the time he did so. It was in accordance with the terms of this new contract that appellee, as guardian, received the money in question. The widow had no right in the matter. *Swift v. R., P. & F. C. Ben. As.*, 96 Ill. 309.

When the contract is between the insurer and the insured, the latter may sell, change or assign the policy. *Cole v. Marple*, 98 Ill. 58; *Johnson v. Van Epps*, 110 Ill. 551.

CONGER, J. This was a bill in chancery filed by appellant against appellee, representing that on the 18th day of June, 1878, Arthur W. Argust, the then husband of appellant, insured his life for \$5,000, and for the benefit of appellant; that about the 25th day of May, 1884, the said Argust, without the knowledge or consent of appellant, surrendered to the company said policy, and in lieu thereof received a new policy, payable to his two children, Bertram C. and Wm. H. Argust. It further alleges that her husband died and the amount of the policy was paid to appellee as the guardian of the children. The bill prays an accounting and that said fund be paid to her by the guardian.

A demurrer was sustained to the bill, and it was dismissed. We think there are no grounds shown by the bill giving a court of equity jurisdiction.

If appellant had a vested interest in the original policy, which neither her husband nor the insurance company had a right to destroy, we see no reason why she might not proceed in a proper action at law against the company to test her right thereto.

There is, however, no privity between herself and appellee, and for that reason no action could be maintained against him.

Affirmed.

Disselhorst v. Cadogan et al.

ERNST DISSELHORST
V.
JOHN P. CADOGAN AND MATILDA CADOGAN.

Landlord and Tenant—Conveyance of Reversion Passes Rent—Partition Sale.

1. An unqualified conveyance of demised premises, whether by operation of law or otherwise, passes the rent thereafter to accrue.

2. In the case presented it is *Held*: That a sale of demised premises by a special commissioner in partition proceedings, under an order merely reserving the rights of the lessee, passed the rent thereafter accruing; and that the statement in the commissioner's deed, that the purchaser was not to have possession until the termination of the lease, was unauthorized and of no effect.

[Opinion filed August 26, 1886.]

APPEAL from the Circuit Court of Adams County; the Hon. WILLIAM MARSH, Judge, presiding.

Messrs. CHARLES M. GILMER and WILLIAM L. GROSS, for appellant.

Messrs. EMMONS & WELLS, for appellees.

PLEASANTS, J. On September 3, 1878, appellees and Elizabeth Hulse made a lease in writing to appellant of 240 acres in Adams County, for one year from March 1, 1879, at \$700, payable, one half on November 1, 1879, and the residue on March 1, 1880, under which he occupied during the term mentioned, and afterward under verbal renewals from year to year until March 1, 1884.

These lessors were some of the heirs of William Cadogan, who died seized of the demised premises and before the execution of the original lease. Appellant paid them the rent regularly until the death of Elizabeth Hulse, in March, 1883, and to appellees the installment due in November next following.

Dieselhorst v. Cadogan et al.

In the meantime, under proceedings in the Circuit Court of said county for the partition of said premises, the same were sold July 28th and deed therefor executed October '22, 1883, by the special commissioner to Henry Glaser, and to him appellant paid the installment due March 1, 1884, notwithstanding he had notice that appellees claimed it. Upon his refusal to pay it to them this suit was brought. The declaration was in debt on a parol *demise* with an *indebitatus* count for use and occupation. Pleas, *nil debet* and no rent in arrear. Trial by 'court without a jury on record evidence and stipulation filed, finding and judgment for plaintiffs, exception and appeal by defendant.

No question is made of the regularity of the partition proceedings, or of the sufficiency of the commissioner's deed to convey the title to Glaser. Appellant, however, was not made a party, nor did he in any way appear.

It is elementary law that rent is an incident of the reversion. An unqualified grant of the demised premises passes the rent thereafter accruing. Crosby v. Loop, 13 Ill. 625; Dixon v. Niccolls, 39 Ill. 372; Hardin v. Forsythe, 99 Ill. 312; Epley v. Eubanks, 11 Ill. App. 272. A conveyance by operation of law, or under a trust deed or power of sale in a mortgage, or by a Master or Sheriff under a decree or execution that is valid against the lessor, will be as efficacious as a deed from him directly. Whatever unqualifiedly passes his reversion will pass the rent thereafter accruing. Carson v. Crigler, 9 Ill. App. 83; Epley v. Eubanks, 11 Ill. App. 272.

They may be severed, however, as by a grant of the land reserving the rent, or an assignment of the rent retaining the reversion. And the claim of appellees here is that the sale and deed to Glaser were not unqualified; that the rent to March 1, 1884, was reserved.

This rests upon the fact that at the sale the special commissioner publicly announced that the premises were occupied under a lease running to that day, and the following statement with which his deed concludes: "It being understood that the said party of the second part takes said premises subject to a lease upon the same, and that he is not to have possession of said premises until March 1, 1884."

The commissioner had only a naked power to execute strictly the order of the court, and could impose no terms or conditions nor make any reservation or limitation not required by that order or by the law. *Bishop v. O'Connor*, 69 Ill. 431. The order required him to sell all the interest of the owners in the premises but not that of the tenant. He was not before the court nor subject to the decree. His right to the possession until March 1, 1884, could not be disturbed. It was fair to those who might purchase the lessors' interest to inform them of this right. This was the possession, which the purchaser was not to have until that day. But neither the possession nor right of possession of the lessors was withheld or reserved. All they had was ordered to be sold, was advertised to be sold, and was sold—all "their right, title, interest, claim and demand." This was sold, according to the notice advertised, "subject to the interest of the tenant on the lands," but to none of the lessors.

It was therefore an absolute, unqualified sale and conveyance of their reversion to Glaser, and passed to him the subsequent rent.

The judgment of the Circuit Court must therefore be reversed and the cause remanded.

Reversed and remanded.

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INDIANAPOLIS, BLOOMINGTON AND WESTERN RAILWAY
COMPANY

V.

THOMAS J. BUCKLES.

Railroads—Killing of Stock—Verdict Sustained—Attorney Fees—Instruction—Practice.

1. Where the evidence in support of the verdict is sufficient, if believed, this court will not interfere.

2. In an action to recover damages from a railroad company for killing a horse, reasonable attorney fees may be recovered for the second, as well as for the first trial, although the new trial was granted by consent of counsel for plaintiff.

I., B. & W. R. Ry. Co. v. Buckles.

3. This court has no basis on which to make an order for an allowance of attorney fees to the appellee for services here, nor is there any convenient mode for its determination of such allowance, if the appellee is entitled thereto.

[Opinion filed August 26, 1886.]

APPEAL from the Circuit Court of McLean County; the Hon. O. T. REEVES, Judge, presiding.

Messrs. F. Y. HAMILTON and C. W. FAIRBANKS, for appellant.

Mr. WILLIAM E. HUGHES, for appellee.

Where there is a positive conflict of evidence, and the facts and circumstances by any fair and reasonable intendment justify the inference of the jury, the verdict will not be disturbed upon appeal. McKichan v. McBean, 45 Ill. 228; Keith v. Fink, 47 Ill. 272; Creote v. Willey, 83 Ill. 444; Chapman v. Stewart, 63 Ill. 332; C., A. & St. L. R. R. Co. v. Stover, 63 Ill. 358.

WALL, J. This was an action to recover damages for killing a horse which it was alleged got upon the track of the railroad through a defective fence.

There was a verdict for plaintiff for \$200 and judgment thereon. The point mainly urged by appellant is that the evidence did not support the verdict. This was the second verdict for the plaintiff in the Circuit Court. There was evidence enough, if believed by the jury, to justify their finding. The instructions given by the court fairly presented the law of the case and it is apparent that the attention of the jury was sufficiently called to the important questions of fact growing out of the evidence. Counsel insist that sundry instructions given on behalf of the plaintiff should have been refused because there was not sufficient evidence on which to base them. We can not take this view and the objection will be overruled. It is objected the court refused the following instruction asked by defendant:

“The court instructs the jury that if you believe from the evidence that no claim was made for attorney’s fees for trying this case before the Justice of the Peace, when the case was so tried, then you can not allow for the same in this court; and if you further believe that this case was tried before a jury in this court at the September term of court, and a verdict of \$180 rendered against the defendant, and the plaintiff consented that a new trial be granted, then the additional labor of trying it at this term should not be considered in your verdict in allowing attorney’s fees; you are further instructed that you can not allow any attorney’s fees unless you believe from the evidence that the defendant is liable for killing the animal.”

In this class of cases the statute authorized a recovery for the value of the animal and for “reasonable attorney fees in any court wherein suit is brought for such damages, or to which the same may be appealed.”

There was no evidence as to the value of the legal services before the Justice of the Peace where the suit originated, and therefore so much of the instructions as referred to fees for those services was unimportant. It is not necessary to determine whether the point is well made in this respect, and as it is not discussed by counsel, we need give it no attention. The feature of the instruction which is argued, relates to the propriety of allowing attorney’s fees for both trials in the Circuit Court. It appears that the motion for new trial made after the first verdict was agreed to by counsel for plaintiff and the new trial was therefore granted by consent. Now it is urged that no additional fee should be allowed for the second trial.

The statute allows reasonable attorney fees for obtaining the judgment. The defendant by obtaining a new trial gained another chance of defeating the claim altogether, or of reducing the amount. We do not see why the fact that the new trial was agreed to should affect the rights of the plaintiff unfavorably. We have no means of knowing the reasons why this consent was given, nor is there anything upon which to infer that the right to recover the fees has been waived or compromised by any unfair or improper conduct of the plaintiff.

Commissioners of Highways v. Mallory.

iff or his counsel. So far as we are able to say upon this record the extra legal services are as properly allowable here as though they had been occasioned in the ordinary way. What amount would be reasonable, would depend upon, among other things, the labor made necessary by protracted or repeated trials and other delays. It is not so unusual for counsel to consent to a new trial as to raise any unfavorable inference, and it is not easy to see upon what ground the appellant, who asked for it, can complain of its direct consequence. It is suggested by counsel for appellee that in the event of an affirmance he wishes an allowance made in this court for his services here. Granting he may have an allowance for such services, we have no basis upon which to make the order nor is there any convenient mode by which we can try a mere question of fact (if the right to a jury is not involved or if it were waived) and the utmost we could do would be to make up an issue to be tried elsewhere. It is deemed better not to undertake this, but to leave the appellee to such course as he may be advised.

The judgment of the Circuit Court will be affirmed.

Affirmed.

COMMISSIONERS OF HIGHWAYS

V.

J. J. MALLORY ET AL.

Roads for Private and Public Use—Sec. 54, Act of 1883—What Petition Must Contain to Give Commissioners Jurisdiction.

1. To give the Commissioners of Highways jurisdiction, a petition under Sec. 54 of the Act of 1883 must substantially aver that the proposed road is to be laid out from one dwelling or plantation of an individual to a public road, from one public road to another, or from a lot of land to a public road.

2. When the clause, "or from a lot of land to a public road," is relied upon, the petition must contain a suitable description of such lot.

[Opinion filed August 26, 1886.]

Commissioners of Highways v. Mallory.

IN ERROR to the Circuit Court of Fulton County; the Hon. J. C. BAGBY, Judge, presiding.

MESSRS. GRAY & WAGGONER, for plaintiffs in error.

MR. JOHN W. BANTZ, for defendant in error.

CONGER, J. This was a proceeding by common law writ of *certiorari*, to review the proceedings of the Highway Commissioners of the Town of Cass, in Fulton County, in laying out a road for private and public use, under Sec. 54 of the Road and Bridge Act of 1883, which provides: "Roads for private and public use, of the width of three rods or less, may be laid out from one dwelling or plantation of an individual to any public road, or from one public road to another, or from a lot of land to a public road, on petition to the Commissioners by any person directly interested."

The petition presented to the Commissioners was as follows: "To the Commissioners of Highways of the Town of Cass, County of Fulton and State of Illinois: The undersigned persons, directly interested therein, do hereby petition you to lay out a road for private and public use, of the width of twenty (20) feet, as follows: Commencing at or near the southeast corner of the southwest quarter of section twenty-seven (27), in the said Town of Cass, and running thence west on or near the said section line of the said section twenty-seven (27) to or near the southwest corner of said section twenty-seven (27); thence south on or near said line, between section thirty-three (33) and section thirty-four (34), to the Bernadotte and Cuba road, and then to end.

The names of the owners of land over which said road will pass are George R. Herbert, George and James Long, John Trotter, M. D. Miller, J. T. Mallory and Saphronia Mallory, and Wilson Rector.

Your petitioners pray that you will proceed to lay out said road, and cause the same to be opened according to law.

Dated at Cass, this 2d day of October, 1885." (Signed by twelve petitioners.)

Lamonte v. Town of Montebello.

Before a petition founded upon the section quoted, *supra*, can give jurisdiction, it must substantially aver that the proposed road is to be laid out from one dwelling or plantation of an individual to a public road, or from one public road to another, or from a lot of land to a public road.

We presume the petition in this case was intended to be based upon the latter clause as there can be no pretense that it complies with either of the other two.

The petition gives us the initial point of the proposed road, the southeast corner of the southwest quarter of section twenty-seven. But which one of the four quarter sections of land that come at this point is meant to be the "lot of land" from which the road is to start, or which one of the interested land owners mentioned in the petition is the owner of the unknown "lot of land," the petition does not disclose.

When the clause, "or from a lot of land to a public road," is relied upon as the initial or starting point for a road, we think it is necessary to describe in the petition such lot by some suitable description, and then pray that a road be granted from such lot of land to the proposed terminus. *Randolph v. Commissioners of Highways*, 8 Ill. App. 128.

We think this petition was fatally defective and failed to give the Commissioners jurisdiction to lay out the proposed road, and the judgment of the Circuit Court, quashing their proceedings, was proper, and is therefore affirmed.

Affirmed.

J. P. LAMONTE

V.

THE TOWN OF MONTEBELLO.

Damages for Killing Sheep—Finding of Justice under Sec. 30, Ch. 8, R. S., not a Judgment—Attempted Appeal—Bond, Void—Estoppel.

1. The finding of a Justice of the Peace in a proceeding under Sec. 30, Ch. 8, R. S., for proof of damages for sheep killed or injured, is in no sense a judgment, and no appeal lies therefrom.

Lamonte v. Town of Montebello.

2. A bond given by a Supervisor upon an attempted appeal from such a finding is absolutely void, and it will not sustain an action.

3. The obligors in such a bond are not estopped from denying the recitals therein contained.

[Opinion filed August 26, 1886.]

IN ERROR to the Circuit Court of Hancock County; the Hon. C. J. SCOFIELD, Judge, presiding.

Messrs. MANIER & MILLER and MASON & HALBROWER, for plaintiff in error.

Messrs. HOOKER & EDMUNDS, for defendant in error.

CONGER, J. This is an action of debt, brought upon an instrument purporting to be given by the town to the plaintiff in error as an appeal bond, reciting, in effect, that Lamonte, on January 24, 1884, before George D. Gates, a Justice of the Peace, recovered a judgment against the town for \$166 and costs, from which judgment the town had taken an appeal to the Circuit Court, with the usual conditions of an appeal bond.

The facts necessary to an understanding of the case are briefly as follows: In January, 1884, Lamonte appeared before said Gates, a Justice of the Peace of said Town of Montebello, and claimed damages, under Sec. 30, Chap. 8, Revised Statutes, because of his sheep having been killed and injured by dogs.

The justice entered upon his docket the following finding: "After hearing and weighing the evidence it is the judgment of the court that the damage that J. P. Lamonte has sustained by the killing and injuring said sheep is \$166, and that J. P. Lamonte should have and recover from the dog tax fund in Montebello Township the sum of \$166, together with the costs of proceedings herein, taxed at \$2.50."

H. C. Hanson, Supervisor of the town, in attempting to take an appeal from this finding of the justice, filed with the Clerk of the Circuit Court, for the purpose of perfecting such appeal, the bond sued upon in this case. At the March term, 1884, of the Circuit Court, the court, on motion of Lamonte, dismissed the appeal, which decision of the Circuit Court was afterward, upon appeal to this court, affirmed.

Lamonte v. Town of Montebello.

Various pleas were filed and proceedings had upon this action of debt, resulting in a judgment against Lamonte for costs, which judgment he brings into this court, by writ of error, for review.

A number of points are raised and discussed with great ability in the briefs filed, but in the view we take it will not be necessary to notice all of them.

There was no judgment to appeal from and hence there could be no appeal.

The finding of the justice was in no sense a judgment against the town; it was a mere adjustment of a claim against the dog tax fund, in the manner provided by the statute, to guide the Supervisor in paying such fund out to those entitled to it.

It follows, we think, as a self-evident proposition, that any attempt on the part of the Supervisor, whether acting upon his own responsibility or by authority of the voters at a town meeting, to give an appeal bond in a case where no appeal is allowed by law, is absolutely void, having no original vitality and incapable of ratification.

“Where bonds have been issued without power or authority of law authorizing their issue, they are absolutely void.” *Barnes v. Town of Lacon*, 84 Ill. 464; *Town of Pana v. Lippencott*, 2 Ill. App. 476; *Lippencott v. Town of Pana*, 92 Ill. 24.

Numerous authorities are cited in support of the proposition urged by appellant, that the obligors in an appeal bond are estopped from denying any of the facts recited in the bond or deducible therefrom.

This doctrine, we think, had no application to this case, for it is the established rule of law in this State as to municipal negotiable bonds, even in the hands of innocent holders for value, that where there is an absence of power to issue them, they are absolutely void, and recitals contained in them will not estop the municipality from setting up such want of power.

If such be the doctrine as to negotiable paper in the hands of innocent holders for value, the reasons for applying it to the case at bar are much stronger and more satisfactory.

Here appellant is the original obligee in the instrument,

Easton v. Mitchell.

having paid nothing for it, nor has the execution of such bond been the necessary cause of the loss of his claim against the fund in question. Had he pursued the remedy provided for him by Sec. 30, we can not see how the execution of the bond, or the pretended appeal, would in any way have interfered with the prosecution of his claim.

We are of opinion there could be no recovery upon the bond in question, against the town, and the judgment of the Circuit Court will therefore be affirmed.

Affirmed.

JOHN M. EASTON

V.

G. M. MITCHELL.

Landlord and Tenant—Term Must be Certain—Construction of Lease—Rule—Quantum Meruit.

1. A lease for "the whole time that he [the lessee] may be postmaster," is held to have expired with the expiration of the commission held by him at the time of its execution.

2. In every estate for years the term must be certain.

3. Where the lessee holds over, the lessor may recover on a *quantum meruit*.

4. It is a rule of construction that a contract should be supported rather than defeated.

[Opinion filed August 26, 1886.]

IN ERROR to the Circuit Court of Coles County; the Hon. J. W. WILKIN, Judge, presiding.

Messrs. CRAIG & CRAIG, for plaintiff in error.

Messrs. WILEY & NEAL, for defendant in error.

CONGER, J. Mitchell was appointed postmaster of Charleston, Illinois. His first commission was dated April, 1877, and expired on the 15th or 16th of April, 1881.

Easton v. Mitchell.

On the 11th day of March, 1879, Mitchell rented from Easton a room for a post office, and the parties executed the following lease :

“ This agreement made and entered into this 11th day of March, by and between Greenville M. Mitchell, of Charleston, Coles County, Illinois, party of the first part, and John M. Easton, of the same place, party of the second part, witnesseth, that the said party of the first part has this day rented from the said party of the second part, the ground floor of the brick building described as follows, to-wit: Eighteen (18) feet eight (8) inches off the east side of lot thirty (30), original town of Charleston, Coles County, Illinois, to be used by said party of the first part as a post office, yielding and paying therefor the sum of ninety-six (96) dollars per annum, to be paid in installments of eight dollars at the end of each month. Said building to be put in good repair by the said party of the second part, the party of the first part paying for said repairs out of the rents as they fall due.

The said party of the first part covenanting and agreeing to occupy, during and for the whole time that he may be postmaster for said town of Charleston. The said party of the second part covenanting for the peaceable and quiet occupancy by the said party of the first part, during the whole of his time as tenant of the premises aforesaid.

Witness our hands and seals at Charleston, this, the 11th day of March, 1879.

GREENVILLE M. MITCHELL,
J. M. EASTON.”

About a month before the expiration of the first commission, which ended April, 1881, Easton notified Mitchell that when his time was out under said commission, he should want the building, or if he, Mitchell, kept it thereafter, he must pay as rent therefor twenty dollars per month.

Mitchell it seems was re-appointed postmaster for another term, and continued in the occupancy of the building after April, 1881, for some fifteen months.

Upon the trial below, plaintiff in error claimed that the written lease expired with the first term, in April, 1881, and testi-

fied to the value of the premises thereafter, upon the theory of recovery upon a *quantum meruit*, whereupon the court excluded such evidence from the jury and instructed them to find for the defendant.

It is not at all clear what the lease means as to the length of time it is to run. But it must be construed to mean the term of office of four years which the first commission covers, or the lease is void, and can neither afford a right of action nor protection of either of the parties.

Every estate for years must have a certain beginning and certain end ; it is called a term, *terminus*, because its duration or continuance is bounded, limited and determined. "A lease for so many years as J. S. shall live, is void from the beginning, for it is neither certain nor can ever be reduced to a certainty during the continuance of the lease. And the same doctrine holds if a parson makes a lease of his glebe for so many years as he shall continue parson of Dale; for this is still more uncertain. But a lease for twenty or more years, if J. S. shall so long live, or if he should so long continue parson, is good, for there is a certain period fixed, beyond which it can not last, though it may determine sooner, on the death of J. S. or his ceasing to be parson there." Blackstone, book 2, page 143.

One of the rules for construing contracts requires that a contract should be supported rather than defeated. "Thus, a deed which can not operate in the precise way in which it is intended to take effect, shall yet be construed in another, if in this other it can be made effectual. This desire of the law to effectuate rather than defeat a contract, is wise, just and beneficial." Parsons on Contracts, Vol. 2, pages 15-17.

It is not unreasonable to say that the parties entering into the lease had in view when they used the general words, "agreeing to occupy during and for the whole time that he may be postmaster," the term of office which the law fixed under the appointment then made at four years, and not future appointments. They are presumed to have known the law, and that by the rules of law the former construction would effectuate and make valid their contract while the latter would render it absolutely void.

Mount v. Scholes.

We therefore are inclined to hold that the written contract expired by its own limitation at the termination of Mitchell's first term, in April, 1881.

From that date, he having been notified by his lessor to surrender the house or pay an increased rent, we hold he was liable for whatever could be shown to be a reasonable rent therefor.

The judgment of the Circuit Court will be reversed, and the cause remanded.

Reversed and remanded.

WILLIAM MOUNT
V.
S. D. SCHOLES.

Jurisdiction—Judgment of Court of Concurrent—When Not a Bar to Suit by Administrator on Notes—Fraud—Evidence.

1. In all cases of concurrent jurisdiction the court which first obtains it will retain it to the end of the controversy, to the entire exclusion of others.

2. A suit by an administrator, on notes payable to his intestate, is not barred by a judgment rendered by a court of concurrent jurisdiction in a fraudulent suit subsequently brought by the wife of the maker in the name of the administrator for her use, she having possession of the notes.

3. Copies of the notes sued on are held to be competent evidence, the parties having agreed to their use and the defendant having wrongfully aided in placing the notes in the records of the other court.

[Opinion filed August 26, 1886.]

IN ERROR to the Circuit Court of Sangamon County; the Hon. JAMES A. CREIGHTON, Judge, presiding.

Messrs. N. M. BROADWELL and W. J. CONKLING, for plaintiff in error.

A former adjudication bars another suit between the same

Mount v. Scholes.

parties and privies for the same cause of action. Jones v. Smith, 13 Ill. 301; Zimmerman v. Zimmerman, 15 Ill. 34; Crosby v. Gipps, 16 Ill. 352; I. C. R. R. Co. v. Allen, 39 Ill. 205; Krenchi v. Dehler, 50 Ill. 176.

A suit may be brought in the name of the party in whom the legal title is, for the use of the holder of an unindorsed note. In case of the death of the payee, the holder may use the name of the administrator, although he protests against it. Bates v. Kempton, 7 Gray, 382; Wait's A. & D. 370.

It is not competent for the defendant to controvert the right of the party for whose use the suit is brought, but it is enough to show a right in the legal plaintiff; and the party for whose use the suit is brought need not show any right in himself. Hamilton v. Brown; Saltmarsh v. Bower, 22 Ala. 221.

Messrs. PATTON & HAMILTON, for defendant in error.

CONGER, J. This was an action of assumpsit, by S. D. Scholes, administrator of Travis Glasscock, deceased, against William Mount, upon several notes executed by said Mount to the said Glasscock in his lifetime.

The suit was brought in the Sangamon Circuit Court on the 28th day of December, 1882, and the summons was served upon Mount upon the 30th day of December, 1882.

Mount interposed two pleas: 1st, *non assumpsit*, upon which issue was joined; and 2d, former recovery, setting up a judgment against him in the Menard County Circuit Court, rendered as claimed upon the same notes. A general demurrer was filed to the latter plea and sustained by the court, upon which ruling error is assigned, but we do not deem it essential to pass upon the point, as appellant introduced the record of the Menard Circuit Court under the general issue, and obtained all the benefit such record could give him thereby.

Travis Glasscock, at the time of his death, was about eighty-two years old, was the uncle of Mount's wife, and had lived a time before his death and died at Mount's house.

Mount v. Scholes.

Before he went to Mount's to board, he caused one Barber to make and retain copies of these notes on Mount.

By some means not explained by the evidence, after Glasscock's death, Mrs. Mount obtained possession of these notes upon her husband, and on the 2d day of March, 1883, some two months after the institution of the present suit, went with her husband to the Menard County Circuit Court, and there, entirely without the knowledge or consent of Scholes, the administrator, filed a declaration in that court in vacation, upon these notes against her husband. The declaration alleged the giving of the notes to Glasscock, and that he in his lifetime had given them to her, and the suit was brought in the administrator's name for her use.

To this declaration, Mount, upon the same day, filed his affidavit of the genuineness of his signature, together with his confession of the amount due, and thereupon judgment was entered by the clerk.

The time when these papers were filed in the Menard Circuit Court does not appear by any file mark upon them, the record showing no file marks upon either the declaration, cognovit or affidavit, but shows merely that the affidavit was sworn to and the judgment entered upon the 2d of March, 1883. So obnoxious do dates appear to be in these papers that the declaration is entitled, "In the Menard County Circuit Court *of* in vacation *term* in the year eighteen hundred and eighty-three."

The court below decided properly in entirely disregarding the Menard judgment for two reasons: 1st, it was a fraud, so bald and palpable in itself as to be entitled to no respect; 2d, the Menard Circuit Court had no jurisdiction, and its pretended judgment could not be used to delay or defeat this action.

The Sangamon Circuit Court had obtained jurisdiction of the subject-matter and of the person of Mount two months before the appearance of the parties in the Menard Circuit Court.

It is elementary law and needs no citation of authorities to support it, that in all cases of concurrent jurisdiction the

Ellsner & Co. v. Radcliff.

court which first obtains it will retain it to the end of the controversy to the entire exclusion of others.

Copies of the notes were used as evidence of the indebtedness by agreement of the parties that such copies might be used, if the originals were proper evidence under the facts of the case. We think it is clear that the originals, if present in court, would have been proper evidence, as they were not merged in the pretended Menard judgment, nor their vitality in any way destroyed by the proceedings in that court.

Again, Mount could not be heard to complain of the absence of the notes, and that they were in the possession of the Clerk of the Menard Circuit Court as part of the files of that office, for he was evidently a party to the placing of such notes there wrongfully.

The judgment of the Circuit Court is right and will therefore be affirmed.

Affirmed.

S. ELLSNER & COMPANY

V.

CHARLES C. RADCLIFF ET AL.

Levy on Goods Claimed to be Held on Consignment—Rights of Owner—Sales—Instructions.

1. Where the owner consigns goods to a factor to sell and account to him for them, and the factor exhibits himself to the world as the owner without the knowledge or consent of the owner, the creditors of the factor can not seize the goods for his debt, even in the absence of actual notice.

2. Where it is a matter of dispute whether the transaction in question was a sale or a consignment, the party claiming to be the owner has a right to have his claim passed upon by the jury under proper instructions.

[Opinion filed August 26, 1886.]

APPEAL from the Circuit Court of Macon County; the Hon. C. B. SMITH, Judge, presiding.

Ellsner & Co. v. Radcliff.

Messrs. OUTTEN & VAIL, for appellants.

Messrs. BUCKINGHAM & WALKER and BUNN & PARK, for appellees.

CONGER, J. Appellants placed in the hands of Steinhardt & Co., at Decatur, Illinois, a quantity of cloaks, to sell at retail and account to them for their value. While in the possession of Steinhardt & Co., under this arrangement, the cloaks were levied upon by appellees as the property of Steinhardt & Co., for their debts. Whether the transaction between appellants and Steinhardt & Co. was a sale by which the title to the property passed to the latter or whether Steinhardt & Co. were factors or agents of appellants, is a disputed question upon which we shall express no opinion for the reason that appellants had the right to urge their theory of the transaction upon the jury and have the law applicable thereto correctly given to them. This we do not think was done by the court in giving the following instruction at the request of appellees:

"10th. The court instructs the jury, in behalf of the defendants, that if they believe from the evidence that the plaintiffs caused the goods in controversy to be delivered to Steinhardt & Co. for sale, that Steinhardt & Co. so used and managed the goods and so conducted his business and so advertised that he exhibited himself to these defendants and others that he appeared to be the owner of said goods to these defendants and the public generally, any creditor taking said goods in good faith, under proper legal process, would have the right to seize said goods and sell the same to make a *bona fide* debt, and if they believe such facts appear from the evidence, they should find the defendants not guilty, provided the defendants did not have any notice that the goods in controversy were the property of the plaintiff."

Under this instruction appellants consigned these goods to Steinhardt & Co. as factors, to sell and account to appellants for them, and such factors exhibited themselves to the world as owners without the knowledge or consent of appellants;

creditors of the factors, unless they have actual notice of the real ownership, could seize the goods for the debt of the factors; this is not the law.

“A power to sell, such as is possessed by a factor or broker appointed for the purpose, can only be executed by way of sale, and does not justify a disposition of the property in any other manner. A factor, therefore, has no authority to pledge the goods of his principal as a security for a debt due from himself, even though the creditor has no notice of his character as factor. So if the factor attempts to make such pledge and delivers the goods to the pledgee, the owner may recover them in an action of replevin.” *Gray v. Agnew*, 95 Ill. 315.

The factor must be exhibited to the world as owner, with the assent of the owner, and by that means obtain credit to make the principal or his goods liable for the debt of the factor. *Kent's Com.*, Vol. 2, p. 625.

The general rule of law is, that no one can, by his sale, transfer to another the right of ownership in a thing wherein he himself had not the right of property, except in instances of cash, bank bills, checks, notes, etc., and no one can acquire a title to chattels from a person who has himself no title to them. The exceptions to this general rule will be found to be cases where the true owner has transferred the property under the form of a regular sale and delivery, and clothed the vendee with the *indicia* of ownership, though under such circumstances as would authorize a rescission of the sale and a recovery of the goods as against the vendee.

If the vendor consents to the transfer of the title, though such consent be temporary only, and obtained by fraud, still an honest purchaser from him will be protected, and the first owner must bear the loss. But this principle does not apply when the original owner has never consented to the transfer of the property, nor voluntarily delivered possession of it under the form of a sale, or clothed the supposed vendee with the *indicia* of ownership although he may have for various purposes delivered his property to another and permitted him to remain in possession thereof. *Jennings v. Gage*, 13 Ill. 610; *Fawcett v. Osborn*, 32 Ill. 411; 1 *Smith's Leading Cases*, 602-892; *Peters v. Smith*, 21 Ill. 417.

Green v. Smith.

While possession of personal property is one *indicium* of ownership, and is *prima facie* evidence of title in the person in possession, yet when explained so as to be consistent with ownership in another it will not defeat the title of the true owner.

A creditor has no greater rights than a *bona fide* purchaser under such circumstances, and therefore the foregoing views are applicable to the case at bar. The instruction given clearly prevented appellants from having their theory of the case properly presented to the jury.

For the error in giving this instruction and refusing the 4th, asked for by appellants, the judgment of the Circuit Court will be reversed and the cause remanded.

Reversed and remanded.

JASON GREEN, ADMINISTRATOR,

V.

CHARLES B. SMITH.

Practice—Reversal under Rule 30.

This court reverses the judgment of the court below *pro forma*, the appellee having failed to file his brief.

[Opinion filed August 26, 1886.]

APPEAL from the Circuit Court of Douglas County; the Hon. J. F. HUGHES, Judge, presiding.

Mr. C. W. WOOLVERTON, for appellant.

Per Curiam. No briefs having been filed by the appellee, under rule 30, the judgment of the court below will be reversed and the cause remanded.

Reversed and remanded.

HIGHWAY COMMISSIONERS

V.

HAMILTON BROTHERS.

Taxation of Costs—Fees of Witnesses, Subpœnaed, but not Called—Practice.

1. The fact that witnesses who had been subpœnaed were not called to testify, is not of itself sufficient reason why their fees should not be taxed.

2. In the case presented, it is held that a motion to retax costs previously paid by the adverse party should have been denied.

[Opinion filed August 26, 1886.]

APPEAL from the Circuit Court of Champaign County; the Hon. C. B. SMITH, Judge, presiding.

Mr. J. L. RAY, for appellants.

Mr. THOMAS J. SMITH, for appellees.

Per Curiam. The appellees recovered a judgment against the appellant which was reversed in this court and the cause remanded. 13 Ill. App. 358. After the case was reversed, but before any other steps taken in the Circuit Court, the appellees, who were plaintiffs below, paid the cost of the case including that made by appellants, defendants below, there then being no judgment against plaintiffs for the defendants' costs. Subsequently the case was redocketed in the Circuit Court and was finally tried *pro forma* it is said—there being no witnesses in attendance—by the court, and formal judgment rendered against the plaintiffs for costs. Whereupon a motion was made by plaintiffs and allowed, to retax the costs, which order is the subject of complaint in the present appeal. The only apparent ground for the order was that the witnesses whose fees were retaxed, though subpœnaed for the defendants, were not called to testify. This would not, as a matter of course, be sufficient

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reason why the party should not recover the cost of such witnesses. It often happens that witnesses are summoned in anticipation of an attack, which, though threatened, is abandoned, when the witnesses are present. *Smith v. Kinkard*, 1 Ill. App. 620.

At any rate the cost in this instance was voluntarily paid by the appellees months before this motion was made, and for this reason if for no other the motion should have been denied.

The judgment will be reversed.

Reversed.

CHLOE J. WRIGHT, WHO SUES, ETC.

v.

FRANK C. WRIGHT.

Practice—Dismissal upon Order of Plaintiff.

The court below is held to have properly dismissed the cause upon a written order of the plaintiff, there being no proof to impeach the validity and good faith of the order.

[Opinion filed August 26, 1886.]

APPEAL from the Circuit Court of Logan County; the Hon. G. W. HERDMAN, Judge, presiding.

MR. OSCAR ALLEN, for appellant.

The appellant claims that the facts set up in the affidavits amount in substance to a plea of payment, or accord and satisfaction, and that such an issue of fact can be tried only by jury, upon testimony *viva voce*, with a right to cross-examine witnesses, unless such rights are waived; and that to dispose of such an issue upon motion and affidavits is a denial of the right of trial by jury.

It is true that it has been held in several instances in this

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State that a case may be dismissed upon motion and affidavits where the court can see that it is impossible that injury can result. Rybolt v. Milliken, 5 Ill. App. 490; Toupen v. Gargnier, 12 Ill. 79; Henchey v. Chicago, 41 Ill. 136; Christopher v. Ballinger, 47 Ill. 107; Ferris v. M'Clure, 36 Ill. 77.

Each of these cases was decided upon peculiar facts which do not seem similar to the facts of the present case, and they fall far short of showing, by decision or principle, that a court can refuse a trial because the defendant and his attorney file their affidavits that the subject-matter of the suit has been paid or settled.

Messrs. A. D. CADWALLADER and BEACH & HODNETT, for appellee.

Parties to a suit may settle the same at any time and courts will enforce settlements so made. Chapman v. Shattuck, 3 Gilman, 49; Toupen v. Gargnier, 12 Ill. 79; Henchey v. Chicago, 41 Ill. 136; Christopher v. Ballinger, 47 Ill. 107.

Per Curiam. In this case a written order of the plaintiff was filed dismissing the suit, which the court carried into effect by dismissing it.

There was no proof to impeach the validity and good faith of the order of dismissal. The court would not try such a question, if contended, by affidavits, nor by such a mode of inquiry determine the validity of the settlement; but the instrument not being impeached would properly carry it out and dismiss the suit, which was in this case done, and, as we think, properly.

Affirmed.

C. & A. R. R. Co. v. Smith.

CHICAGO & ALTON RAILROAD COMPANY

V.

MARSHALL H. SMITH.

Right of Physician to Practice Medicine—Evidence—Sufficiency of.

In an action by a physician to recover for medical services, slight evidence of his right to practice medicine is sufficient as against one who called him.

[Opinion filed August 26, 1886.]

APPEAL from the Circuit Court of Greene County; the Hon. G. W. HERDMAN, Judge, presiding.

Messrs. PATTERSON & STARKEY, for appellant.

Mr. DAVID F. KING, for appellee.

WALL, J. The plaintiff recovered \$15 for medical services rendered to a person who had been injured by a train on defendant's road. It was alleged the services were rendered at the instance of the conductor and station agent. There was evidence tending to make out the case. The only point upon which there is difficulty relates to the legal right of the plaintiff to practice medicine. Conceding he must prove this before he can collect his bill, slight evidence would suffice.

He testified without objection that he had practiced since 1872, and that he had a certificate as required by the State Board. It was shown that his name appeared on the register of physicians in the County Clerk's office. This is enough as against the defendant, who called him, and thereby recognized his right to exercise the functions of his profession.

The judgment will be affirmed.

Affirmed.

City of Springfield v. Scheevers.

CITY OF SPRINGFIELD
V.
ELIZABETH SCHEEVERS.

21	203
68	258

Municipal Corporations—Injury Caused by Excavation in Street by Lot Owner—City Liable for—Practice.

1. The duty of a municipal corporation to maintain its streets in a safe condition can not be evaded or delegated to others, and it is liable for resulting damages if it authorizes or permits the owner of an abutting lot to make excavations in front thereof.

2. This court will not consider an objection that the damages are excessive, which was not made on the motion for a new trial.

[Opinion filed August 26, 1886.]

APPEAL from the Circuit Court of Sangamon County; the Hon. JAMES A. CREIGHTON, Judge, presiding.

Messrs. GREENE, BURNETT & HUMPHREY, for appellant.

Messrs. McCLEARNAND & KEYES and JOHN O. SNIGG, for appellee.

WALL, J. The appellee recovered a judgment for \$1,000 against appellant for injury sustained by falling into an excavation in a public street.

It appears that certain private persons wishing to erect a building at the point in question applied to the city for and were granted permission to excavate the sidewalk.

The opening thus made not being sufficiently guarded the appellee received the injury complained of. It is urged the damages are excessive. This objection was not made on the motion for new trial and can not be considered here for the first time. *Jones v. Jones*, 71 Ill. 562; *O. O. & F. R. V. R. R. Co. v. McMath*, 91 Ill. 104.

The main question is whether, upon the facts, the city is liable if the plaintiff was exercising ordinary care. It may be

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assumed the jury were warranted in their verdict as to the point that there was no want of ordinary care on the part of plaintiff.

The duty of the city to maintain the streets and sidewalks in such condition as to be reasonably safe for pedestrians, is not denied; but counsel insist that if there was a failure to provide the necessary protection the fault lies with the persons who were erecting the building and the city can not be held without showing notice, or such a condition of things for such a length of time that notice may be implied. Where a street becomes unsafe from ordinary causes and injury is sustained in consequence, the basis of the action being negligence, notice, in fact or to be inferred from the circumstances, is essential to a recovery. But the duty of maintaining the streets in a safe condition devolves upon the corporation and can not be evaded or delegated to others, and if the city by its direct act or authority causes or permits the street to get out of repair, it will be liable. The rule is so stated in Dillon on Mun. Corp., Sec. 791 (2d Ed.), and the author further says that upon this principle, that the obligation may not be surrendered or abdicated, the city is liable for injuries caused by open excavations made therein with its knowledge or consent, expressed or implied, by the adjoining lot owner, for the purpose of an area or to obtain light and air for the basement or cellar of his building. This reasonable and just rule is applicable here. The city gave permission to make the excavation. True, there was a condition that the work should be done with care and due regard for the safety of all who might have occasion to pass that way, but this did not absolve the city from its duty.

It must be presumed to have known the condition of things and should be held responsible, as though it had notice, for the direct result of what it expressly authorized.

The judgment will be affirmed.

Affirmed.

ALONZO C. GREEN AND MARY GREEN

V.

MICHAEL J. DOYLE.

Liability of Owner of a Dog for Injuries to a Colt—Trespass—Pleading—Practice.

1. In an action to recover damages resulting from injuries to a colt, while lawfully in the pasture of a third person, caused by the defendant's dog, which he had unlawfully taken within the pasture, it is *held*: That the defendant is liable for any injury done by the dog; that no averment that he had previous notice of a vicious disposition in the dog was necessary, and that the declaration, being in an action on the case, was substantially good.

2. A judgment will not be reversed on account of errors which worked no substantial injury to the appellants.

[Opinion filed August 26, 1886.]

APPEAL from the Circuit Court of Adams County; the Hon. WILLIAM MARSH, Judge, presiding.

Messrs. BONNEY & WOOD, for appellants.

The owner of domestic animals not naturally inclined to mischief is not liable for any injury committed by them to the property of another, unless it can be shown that he previously had notice of the animal's mischievous propensity. Cooley on Torts, 342; Judge v. Cox, 1 Stark. 285; Beck v. Dyson, 4 Camp. 198; Jones v. Perry, 2 Esq. 482; Stumps v. Kelley, 22 Ill. 140; Pickering v. Orange, 1 Scam. 338; Brent v. Kimball, 60 Ill. 211; Keightlinger v. Egan, 65 Ill. 235; Wormley v. Gregg, 65 Ill. 251; Mareau v. Vanatta, 88 Ill. 132.

If the animal is unlawfully in the close of plaintiff and does mischief, he may bring trespass for breaking the close and allege the mischief in aggravation of damages without alleging or proving *scienter*, but in an action on the case, the rule is otherwise. Van Leuven v. Lyke, 1 N. Y. 515.

The gist of the action of trespass to realty is the injury to

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the possession, and to maintain it the plaintiff must have an interest, however temporary, in the soil itself or its profits. and if the premises be occupied, plaintiff must also have, as against one other than a tenant in common, actual and exclusive possession of the premises. *Smith v. Wunderlich*, 70 Ill. 426 ; *St. L., V. & T. H. R. R. Co. v. Town of Summit*, 3 Ill. App. 155 ; *Dean v. Comstock*, 32 Ill. 173.

Mr. GEORGE W. FOGG, for appellee.

Where the injury is committed by an animal through the negligence of the owner, *scienter* as to his mischievous propensity need not be alleged or proven. 1 Chitty on P. (16 Am. Ed.), bottom page 123 and note (u 3).

If the owner act illegally, as by trespassing with his dog, he will be liable, although the dog did the injury complained of against his will. 1 Chitty on P., bottom page, 123, note (x); *Beckwith v. Shoredyke*, Burr, 2092 ; 9 Ballou's Abr., 486 ; *Deane v. Clayton*, 7 Taunt. 516.

If the master accompany the dog, himself a trespasser, the damage done by the dog is deemed consequential upon the wrongful action of the master, and renders the master liable to the same extent that it would had he done the damage with his own hand. 1 Addison on Torts, Sec. 381.

And it is no defense to say the title of the *locus in quo*, in which the alleged tortious acts took place, is in one other than the plaintiff, unless the defendant shall justify by showing authority from such other person to enter the premises, *Finch v. Alston*, 23 Am. Dec. 299.

When a dog, not known to be vicious, enters alone upon land and does mischief, his owner is not liable ; but if the dog accompany his owner, while the latter is trespassing, and does mischief, though against the will of the owner, the trespasser will be liable for the damage done by his dog. *Wolf v. Chalker*, 31 Conn. 128 ; 49 Am. Dec. 256.

And many of the cases go further. Where a dog entered the land of another and killed a cow, though the owner had no previous knowledge of the malicious character of the dog, he was held to be liable for the damages. *Chunot v. Larson*, 43 Wis. 536 ; 28 Am. Rep. 667.

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Where defendant's animals are unlawfully and as trespassers in the close of another, their owner is liable for all damages or injuries they commit, whether he had previous notice of their tendency to commit the harm or injury complained of or not. Nor need it be alleged or proved that the owner or keeper of such animals had any previous notice of their vicious disposition, or that they had previously shown such disposition. *Angus v. Radin*, 8 Am. Dec. 626; *Dolph v. Ferris*, 42 Am. Dec. 246; *Saxton v. Bacon*, 31 Vt. 540; *Lyons v. Merrick*, 105 Mass. 71; *Duncle v. Cacker*, 11 Barb. 387; *Lee v. Riley*, 18 Com. B. (N. S.) 722; *Ellis v. Loftus Iron Co., L. R.*, 10 C. P. 10; *Tonawanda R. R. Co. v. Munger*, 49 Am. Dec. 257, notes, and cases there cited.

If a dog accompanies his trespassing owner, and does damage, such trespassing owner or keeper must answer for it, without regard to previous propensity, because the injury complained of is but the proximate consequence of his own trespass. *Beckwith v. Shoredyke*, 4 Burr, 2092; 49 Am. Dec. 257.

He who has the care, custody or control of trespassing animals is liable for all the damage they may occasion. *Smith v. Jacques*, 6 Conn. 530; *Russell v. Cotton*, 31 Pa. St. 525; *Noyes v. Colby*, 30 N. H. 143.

CONGER, J. In the summer of 1885, appellee Doyle pastured his mare and colt in the inclosed and private pasture of one Piggott, where stock of other people were also kept and pastured.

Appellants, Green and wife, accompanied by a small dog, unlawfully climbed over the fence and entered the pasture.

From some cause the horses became frightened and started to run, when the dog of appellants chased and worried the colt of appellee so much that in running over some rough and broken ground it fell, and received such injuries therefrom that it afterward died.

A declaration in case was filed setting forth at large the foregoing facts, to which a demurrer was filed, and upon the court overruling the demurrer appellants chose to abide by it, whereupon a jury was called and appellee's damages assessed at \$160.50, for which judgment was rendered.

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The principal objection taken to the declaration is that there is no averment that appellants had previous notice of a vicious disposition in their dog.

The answer of appellee is that appellants and their dog were at the time trespassers, and unlawfully in the pasture where appellee's colt was, and the injury was the direct and natural consequence of such trespass; to which appellants urge in reply that such trespass is a wrong done only to the one in possession of the close, and of which appellee can not avail himself as the foundation of action.

So far as the trespass of appellants upon the land of Piggott was an invasion of the rights of those in possession, and an injury to the close, it would clearly be no concern of appellee; but if such unlawful entry was the direct and proximate cause of injury to appellee, we see no good reason why it may not afford a ground of action to him.

The vital question is, whether the dog was by the voluntary act of appellants wrongfully and illegally in the place where the injury was inflicted; if so, they would be liable for any injury done by the dog, although appellants had no previous knowledge that he was vicious. *Goodman v. Gay*, 15 Pa. St. 188; *Dicker v. Goodman*, 44 Me. 322; 1 Addison on Torts Sec. 381; 1 Chitty's Pl., side paging, 82.

We think the demurrer was properly overruled. The declaration was substantially good, not in trespass to personal property, or to real estate, but in an action on the case, which was the proper form of action; hence the authorities cited by appellants upon the question of trespass to real estate have no application. Some of the questions asked the witnesses upon the assessment of damages are not entirely free from error, but we do not think they worked any injury to appellants, and we do not therefore notice them in detail.

Upon the question of the value of the colt, we think the evidence was sufficient to justify the finding of the jury, and the judgment of the Circuit Court will therefore be affirmed.

Affirmed.

Skinner v. Morgan.

WILLIAM SKINNER AND WILLIAM CANNON

V.

F. S. MORGAN.

Individual Liability of Highway Commissioners for Negligence—Open Ditch—Jurisdiction of Justices of Actions to Recover Damages for Injuries to Personal Property.

1. Commissioners of Highways are individually liable for injuries resulting to others from the negligent performance of their official duties in constructing or repairing a public highway, such duties being ministerial.

2. It is negligence on the part of Highway Commissioners to leave a tile ditch along a highway open for months, without proper measures to protect those using such highway.

3. A Justice of the Peace has jurisdiction of an action to recover damages for an injury to personal property caused by the negligent performance by Highway Commissioners of their duties.

[Opinion filed August 26, 1886.]

APPEAL from the County Court of Champaign County; the Hon. J. W. LANGLEY, Judge, presiding.

Statement of the case by CONGER, J. This case was brought into the County Court of Champaign County by appeal from a Justice of the Peace, where appellee sued appellants and one Meibach, to recover for the loss of a steer alleged to have been killed by falling into an open ditch while being driven along the public road, in September, 1885.

Defendants below became Commissioners of Highways of Tolono Township at the following dates: Cannon in 1883, Meibach in 1884, and Skinner in 1885. Before any of them came into office, there was an open ditch about one-half mile long, running along the north side and parallel with the road leading east from the village of Tolono, through which the water from certain ponds situated in the road ran toward the Embarras River. This ditch is described by witnesses who measured it as being seven feet wide and four feet deep. The north bank next to the wire fence was nearly perpendicular,

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while the south bank sloped at an angle of about forty-five degrees to the bottom. After Skinner came into office in the spring of 1885, the Board of Commissioners caused to be dug in the bottom of this open ditch a tile ditch about two feet deep and one foot wide, in which an eight-inch tile was laid, and filled in six or eight inches of earth, leaving about one foot of the tile drain open. The work was completed about June 1st. The commissioners testified that in digging this tile ditch numerous veins of sand were cut across, which were of such a nature as to make it probable that the tile would settle unevenly and need to be re-adjusted before the ditch prepared for them was filled; for which reason the ditch, or about one foot of it, was left open. In the latter part of September, 1885, Morgan, when driving four steers along this road in the direction of Tolono, had the misfortune to have one of them killed by falling into this ditch, as he alleges. Attributing his loss to the negligence of these commissioners, he brought this suit against them as individuals, before a Justice of the Peace, to recover the damage incident to the loss.

Mr. J. O. CUNNINGHAM, for appellants.

The reasoning of the court in *Sykes v. Town of Pawlet*, 43 Vt. 439, is strongly against the liability of the defendants.

This court had a similar question before it in *Pickerell v. Kunst*, 15 Ill. App. 46, and decided the commissioners not liable. (See, also, 2 Thompson on Negligence, 819.)

The court improperly refused instructions for the defendants based upon the legal and proper discretion vested in Commissioners of Highways, the effect of which is in all cases to make these officers liable for the negligence of any and all passers over their roads, and to require action on their part whether they have money to do with or not. *Town of Harwood v. Hamilton*, 13 Ill. App. 358.

Mr. J. L. RAY, for appellee.

CONGER J. Two questions arise upon this record: First, are Commissioners of Highways individually liable for an in-

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jury resulting to others from the negligent performance of their duties as such commissioners?

We think this question is settled in the affirmative in *Tearney v. Smith*, 86 Ill. 391, where the court say: "The work of constructing or repairing a public highway is not a judicial but a ministerial act, and must be performed with a proper regard to individual rights as well as the public accommodation. Commissioners of Highways are only in a very limited sense judicial officers; repairing a highway is not of that character. For the negligent performance of ministerial acts they are personally responsible if injury results to others."

In this case there was a dangerous excavation, made by the commissioners themselves, left for months along the side of the highway, with no guards or other protection to the traveling public, for the purpose, as the commissioners claim, of testing the effect of tiling placed therein.

The commissioners had no right to thus expose the lives and property of citizens. If they desired for any purpose to leave such a dangerous ditch open until they could satisfy themselves as to its character or capacity, they should have taken some proper measures to protect the public while they were thus experimenting.

The second question is: Has a justice jurisdiction of an action founded upon an injury to the personal property of another, caused by the negligent performance on the part of the commissioners of their duties?

The determination of this question depends upon the proper construction of the second paragraph of Sec. 13, chapter 79, which declares that Justices of the Peace shall have jurisdiction "in actions for damages for injury to real property, or for taking, detaining or injuring personal property."

We said in *C. & A. R. R. Co. v. Calkins*, 17 Ill. App. 55, "The expression here used, 'injury to real property,' is about as comprehensive as could well be devised, and would seem to embrace all injuries, whether direct or consequential; and this we understand to be the view taken by the Supreme Court in *Lackman v. Deisch*, 71 Ill. 59." We think the same may be said of the expression "injuring personal property." Prior

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to the revision of 1872 the jurisdiction of a justice in relation to injuries to personal property was given by the 12th paragraph of Sec. 18, Chap. 59, and was as follows: "In all actions of trespass on personal property, and of trover and conversion in which the damages claimed do not exceed \$100." The same language was also used prior to the revision, in reference to a justice's jurisdiction over injuries to real estate, confining such jurisdiction clearly, to trespass alone, and not to actions in the nature of actions on the case; for by the Act of February 15, 1855, Laws of 1855, page 139, it is provided: "That the jurisdiction of Justices of the Peace be and the same is hereby extended so as to include all actions for trespass upon real estate, etc."

We think the Legislature, by the revision of 1872, intended to enlarge the jurisdiction of a Justice of the Peace so as to embrace every class of injuries, both to real estate and personal property, whether direct or consequential, when the damages claimed do not exceed \$200.

We perceive no good reason why damages for consequential injuries to personal property, for the recovery of which in a court of record an action on the case would be proper, may not be recovered before a Justice of the Peace as well as damages for the same character of injuries to real estate.

Numerous errors are assigned upon the instructions, but as they are substantially in accord with the views herein expressed, they will not be particularly noticed.

The judgment of the County Court will be affirmed.

Affirmed.

Brechtwald v. People of State of Illinois.

NICHOLAS BRECHWALD AND FREDERICK BRECHWALD

V.

THE PEOPLE OF THE STATE OF ILLINOIS.

Sales—Delivery to Common Carrier, a Delivery to Consignee—Sale of Liquor to Purchaser in another County—Conflict of Authority.

1. As a general rule, a delivery to a common carrier is held to be a delivery to the consignee.

2. Where liquor is sent by express by a dealer in one county to a purchaser residing in another, the dealer can not be prosecuted in the latter county for illegally selling liquor therein.

3. Where the question at issue has not been passed upon by the Supreme Court, and the authorities are conflicting, this court will adopt such rule as seems most consistent with sound reason and principle.

[Opinion filed August 26, 1886.]

IN ERROR to the County Court of McDonough County; the Hon. J. H. BAKER, Judge, presiding.

Messrs. FOREST F. COOKE and W. B. BRADFORD, for plaintiffs in error.

Messrs. JAMES A. MCKENZIE and H. C. AGNEW, for defendant in error.

“Delivery to a carrier is considered as a delivery to the consignee only when and as it is in agreement with the terms and intention of the shipment.” Taylor v. Turner, 87 Ill. 296; Cayuga Co. Bank v. Daniels, 47 N. Y. 631.

If the plaintiffs in error intended to part with the title upon delivery of the goods to the carrier, why send them C. O. D.? Why attach to the shipment a positive condition that the goods must not be delivered until paid for, and if not paid for that they must be held subject to the order of the consignor?

In a conditional sale the title does not pass until the condition is performed. Benjamin on Sales, Sec. 366; Conway v.

21	213
78	457

21	213
88	82

21	213
99	304

21	213
105	121

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Bush, 4 N. Y. 564; Cayuga Co. Bank v. Daniels, 47 N. Y. 631; Wabash Elevator Co. v. Bank of Toledo, 23 Ohio St. 311; Hunt v. Eldridge, 5 Ill. App. 529; Russell v. Minor, 22 Wend. 659; Osborn v. Gantz, 60 N. Y. 540; Scudder v. Bradbury, 106 Mass. 422; Hill v. Ficeman, 3 Cush. 257; State v. Comings, 28 Vt. 508.

Tested by these authorities a sale of goods shipped C. O. D. is not complete until payment is made.

The express company is the agent of the seller, and transacts the business for him. State v. Comings, 28 Vt. 508; Commonwealth v. Greenfield, 121 Mass. 40; Reynolds v. B. & M. R. R. Co., 43 N. H. 580.

Sending goods C. O. D. by express is not different from sending goods by a private individual upon the same terms.

The exact question involved in this case has never been passed upon by the higher courts of this State; yet cases involving the same principle have recently been before the Supreme Court of Massachusetts, (Commonwealth v. Greenfield, 121 Mass. 40, and Commonwealth v. Eggleston, 128 Mass. 408,) and in each case the court held that the sale is made at the place where the liquor is delivered and paid for.

In People v. Shriever, Chicago Legal News, February 21, 1885, a case exactly parallel as to its facts with the case at bar, Judge Treat, United States District Court of Illinois, says: "In the case of liquor shipped by the defendant to Fairfield by express, C. O. D., the liquor is received by the express company at Shawneetown as the agent of the seller, and not as the agent of the buyer, and on its reaching Fairfield it is there held by the company as the agent of the seller, until the consignee comes and pays the money."

WALL, J. The plaintiffs in error are liquor dealers, doing business in Knox County. They received orders from Phillips, who was a resident of McDonough County, and on several occasions sent him intoxicating liquors in gallon packages by express, C. O. D. It was alleged that Phillips was a person in the habit of getting intoxicated, and that the sales so made to him were in violation of the Dramshop Act.

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The prosecution was instituted in McDonough County and resulted in conviction. The important question presented is whether the sale was made in Knox or McDonough County.

When the terms of sale are agreed on and the bargain is struck and everything the seller has to do with the goods is complete, the contract of sale becomes absolute between the parties without actual payment or delivery, and the property and risk of accident to the goods rest in the buyer.

A delivery to a common carrier is generally deemed a delivery to the consignee. 2 Kent Comm. 492-496; Wade v. Moffett, 21 Ill. 110; Owens v. Weedman, 32 Ill. 409; Benjamin on Sales, Secs. 1, 181 and 315.

When the liquor was delivered to the carrier, nothing remained to be done by the seller—the sale was complete, he retaining merely a lien for the price. The property rested in the buyer, and while he could not obtain possession until he paid the price, his right was perfect to have the property when the price was paid. The vendor could not withdraw from the bargain, and though the value of the liquor might advance he could receive only the price fixed. If there was an accident the loss would fall upon the vendee. In a word, it was his property, subject only to the lien for the price. This view is taken by the Supreme Court of Alabama, in Pilgrimage v. The State, etc., 71 Ala. 368.

Counsel refer to a case in Vermont, and to rulings of U. S. Circuit Courts, some of which we have not been able to find, as holding the opposite. Where the rulings of courts are not harmonious, and the point has not been settled by our Supreme Court, we are at liberty to adopt such rule as to us seems most consistent with sound reason and principle.

In our opinion the sale in this instance was made in Knox County, and the prosecution was improperly instituted in McDonough.

The judgment will be reversed.

Reversed.

Hughes v. Stubblefield.

WILLIAM E. HUGHES

V.

WILLIAM STUBBLEFIELD AND JOSEPH ATOR.

Chattel Mortgage of Property Held under Distress Warrant, Valid.

1. A chattel mortgage is valid though at the time of its execution a third person holds the property under the mortgagor, and has or claims to have a special property therein.

2. In the case presented, it is held that a chattel mortgage of property, which was at the time of its execution in the possession of a third person under a distress warrant, is valid.

[Opinion filed August 26, 1886.]

APPEAL from the Circuit Court of McLean County; the Hon. O. T. REEVES, Judge, presiding.

Mr. H. D. SPENCER, for appellant.

A sale by a party not in possession of personalty will convey a good title to the vendee. *Hodges v. Hurd*, 47 Ill. 363.

A sale may be valid though the thing sold be not in the owner's possession at the time of the sale. *Tome v. Dubois*, 6 Wall. 548; *The Sarah Ann*, 2 Sum. 206; *McIlvain v. Edgerton*, 2 Rob. 422; *Carkland v. Morrison*, 33 Me. 190.

The landlord had no right to take this property except by a lien, which he was bound to complete and perfect, and failing to complete and perfect the lien it is to be treated as having been void from the beginning. *Storey v. Agnew*, 2 Ill. App. 353. See also *National Bank v. Thomas*, 125 Mass. 278.

Mr. THOMAS F. TIPTON, for appellee.

At the time this property was mortgaged to appellant, as claimed by him, it was held adversely, and John and William Rix had but a right of action, which was not the legal subject of transfer. *McGoon v. Ankeny*, 11 Ill. 558; *Young v. Ferguson*, 1 Litt. 298; *Gardner v. Adams*, 12 Wend. 297; *O'Keefe v. Kellogg*, 15 Ill. 347; *Bowers v. Bodley*, 4 Ill.

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App. 279; Stogdell v. Fugate, 2 A. K. Marsh, 136; Dunklin v. Wilkins, 5 Ala. 199.

WALL, J. The chattels in question belonged to Rix and were taken by Ator as bailiff of Stubblefield, who was landlord of Rix, upon a distress warrant for rent claimed to be due under the lease.

While in the possession of Ator, or those holding under him, Rix gave Hughes a chattel mortgage upon the property. This instrument was duly acknowledged and recorded according to law, and having become due by its terms, Hughes, after demand and refusal, brought the present action of replevin. The proceeding by distress was afterward abandoned. The replevin case was tried by the court without a jury, and the issues were found for defendant. This conclusion was based upon the proposition that when the chattel mortgage was executed the possession was held adversely and no title passed.

In the cases of McGoon v. Ankeny, 11 Ill. 580, and O'Keefe v. Kellogg, 15 Ill. 347, the property was held adversely, and the title was also claimed by those holding the adverse possession. Those cases announce the rule that the real owner of personal property can not sell his right or title to it while it is in the actual adverse possession of one who claims that title to it, the reason assigned being that it is against the policy of the law to allow a party to buy a law suit—a mere right of action in attempting to purchase personal property. Applying the rule to those cases it does not necessarily reach the case where property is held by a mere wrongdoer, not claiming title, nor the case of a bailee or lien holder whose claim is subordinate to and by virtue of the general property and right of the acknowledged owner. As was said by Justice Story in the case of *The Brig Sarah Ann*, 2 Sumner, 211, "There is no principle of law which establishes that a sale of personal property is void because such property was not in possession of the rightful owner at the time of the sale. The sale under such circumstances is not the sale of a right of action, but is a sale of the thing itself and good to pass the title against every person not holding the same under a *bona fide* title for a valuable consid-

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eration without notice, and *a fortiori* against a wrongdoer. This is cited approvingly in *Tornes v. Dubois*, 6 Wall. 548, and in 2 Wait's Actions and Defenses, where it is said: "Owners of personal property are not therefore obliged to treat every act of a third person who invades their right of possession or property as constituting a tortious conversion of the property, but they may, if they think proper, waive the tort, and in that state of case they may sell the property and convey a good title, and their vendor may upon demand and refusal maintain trover."

In *Hodges v. Hurd*, 47 Ill. 363, five bales of cotton, while in the hands of the surveyor of the port, who had seized them to await an examination for a supposed violation of the regulations of the treasury, were sold by the owner to Hurd.

The vendor and vendee went to the surveyor and notified him of the sale, and that he was to deliver the cotton to the vendee, Hurd.

Afterward, and while still in possession of the surveyor, it was levied upon, under an attachment against the vendor, and Hurd then brought replevin against the officer. It was held the title passed to Hurd. The court said that a mere notice to the bailee was sufficient to work a change of possession, and his consent is not material, as on notice he becomes keeper for the true owner by operation of law; that it would be unreasonable to allow the bailee of property to prevent the owner from making a valid sale by refusing to agree to surrender it to the purchaser after the termination of his own right of possession; that the object of requiring a change of possession to accompany a sale of personal property is to give notice to the public, and when property in the custody of a bailee is sold, this object is as much accomplished by notifying the bailee of the sale and directing him to hold for the purchaser as it would be by his express promise thus to hold, and that the fact of sale would be learned by inquiring from the bailee in one case as well as the other. Now, in the case at bar the true and undisputed owner, Rix, was not in actual possession, but the possession was in the bailiff, not claiming an adverse title, but merely a lien by virtue of the title of Rix.

If Rix had not been the owner the possession would not have been taken by the bailiff, and he was really holding subordinate to Rix, confessing and depending upon his title.

Rix had an unquestioned right, subject only to the asserted lien. He might well sell that right, and vest the buyer with it.

The chattel mortgage was given pursuant to the statute providing for a retention of possession by the mortgagor until the debt matured or the happening of the condition upon which the mortgagee might obtain possession. Under such circumstances we hold the bailiff's possession was the possession of the mortgagor, and when the right of the mortgagee matured he might demand possession subject to the lien; or if the lien was discharged, free from it. There is nothing in this to oppose the policy of the law. The mortgage was acknowledged and recorded as the law required. This is equivalent to a change of possession, and it gave notice to all, including the bailee, who became keeper for the true owner by operation of law. No agreement to that effect by the bailee need be shown, as the law will presume it. To hold otherwise would be to impose an unreasonable restraint, an unnecessary limit upon the dominion of one over his own property. Such dominion must include the right of disposal, though the possession may at the time be in another, by virtue of his general title, and should be upheld so long as the matter concerns only the vendor, vendee and bailee. This right is valuable, and to deny it would often work extreme hardship.

It is a general rule when the terms of sale are agreed on, and everything the seller has to do with the goods is complete, the sale is absolute as between the parties without actual payment or delivery, and thereupon the property in, and risk of accident to the goods will vest in the buyer. 2 Kent's Comm. 492.

Herman, in his work on Chattel Mortgages, Sec. 37, states it as the law that property in the hands of an officer, under and by virtue of a writ of attachment or execution, is subject to a mortgage by the owner. When the mortgage is made while the property is so held under a levy against the

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actual owner, and made to one having notice of the levy to secure a prior debt, the mortgagee will be entitled to any surplus after satisfying the execution, the property passing to him subject to such lien. So a mortgage will be valid, notwithstanding at the time of its execution a third person holds the property under the mortgagor, and has a special property therein. *Appleton v. Bancroft*, 10 Met. 231; *McCalla v. Bullock*, 2 Bibb, 288. See also *Jones on Chattel Mortgages*, Sec. 115, where a similar statement of the law will be found.

We are of opinion the plaintiff below was entitled to recover. The judgment will be reversed and the cause remanded.

Reversed and remanded.

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183s 210/

GEORGE W. FANNING AND WILLIAM F. FANNING
V.
ANDREW RUSSELL ET AL.

Former Adjudication—New Matter—Vendor's Lien—Practice.

The facts and law of a cause, as determined by this court and by the Supreme Court, in another suit between the same parties, can not be changed, after the cause has been remanded to the court below, by the agreement of a party, the default of others, new or additional evidence however taken, or any decree of the court without the consent of the parties.

[Opinion filed August 26, 1886.]

IN ERROR to the Circuit Court of Sangamon County; the Hon. JAMES A. CREIGHTON, Judge, presiding.

Mr. GEORGE W. SMITH, for plaintiffs in error.

Messrs. KETCHAM & HATFIELD, for defendants in error.

PLEASANTS, P. J. A former decree in this case was reversed by this court upon appeal taken by these defendants

in error, and the cause remanded. 10 Ill. App. 304. The scope and result of other litigation over the same transactions may be seen in Russell v. Fanning, 2 Ill. App. 632, and 94 Ill. 386.

Inasmuch as no legal question of importance is presented by this record, it is unnecessary to repeat the statement of its history and status up to the time of the last reversal, which fully appears in the opinions so reported.

When it was redocketed upon being last remanded the defendants in error obtained leave to amend their answer to the original bill of James M. Epler, and also their cross-bill, to which he had filed the plea of former adjudication. These amendments set forth that on the 14th of August, 1875, under a decree of foreclosure of the Jones mortgage, the master in chancery sold the E. $\frac{1}{4}$ N. W. $\frac{1}{4}$ of section 9, and the W. $\frac{1}{4}$ N. E. $\frac{1}{4}$ of section 8, to said James M. Epler, for \$5,221; that on August 12, 1876, said Epler, being then the attorney of these plaintiffs in error, executed to them a certificate of redemption thereof, which was without a seal and not recorded until September 2d; that Andrew Russell, one of the complainants in said cross-bill, and defendants in error here, acting for all of them, on August 14, 1876, without any knowledge of said pretended certificate of redemption, paid to the Sheriff of Morgan County, to redeem from said sale to Epler, the sum of \$5,743.10, being the full amount required for that purpose, which was by said Sheriff, on the 16th of said month, paid over to and received by said Epler, who still retains the same; that the same day said Sheriff executed to said Andrew a proper certificate of redemption, which was duly recorded, and in pursuance thereof, on November 16th, his deed of conveyance of said lands; and that the pretended previous redemption by plaintiffs in error and Epler's certificate thereof and their mortgage to him for the amount to be paid therefor, are fraudulent and void.

This was a new claim of title paramount to said E. $\frac{1}{4}$ N. W. $\frac{1}{4}$ of section 9, which is part of the lands in controversy. Plaintiffs in error were defaulted as to the cross-bill so amended without any rule upon them to answer or other means to

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obtain it, and a final decree entered on the same day said amendments were filed.

This decree, which as to its material findings and provisions purports to be made by agreement of Epler and the Russells, as well as upon the pleadings, master's report of evidence and proofs taken in open court, and the default of plaintiffs in error, their mother and sisters, entirely disregards and reverses the finding, judgment and directions of this court upon remanding the cause, and the opinion of the Supreme Court upon the creditor's bill in 94th Ill. above referred to. Without passing upon the equitable title to the notes held by Epler or the others outstanding, if any, of those given by plaintiffs in error for the lands in controversy, or enforcing the vendor's lien to secure them in favor of defendants in error as prayed in their cross-bill, it dismisses the original bill, finds the facts and equities to be as stated and claimed in the cross-bill, sets aside, vacates and cancels the deed of Sampson Fanning to plaintiffs in error as fraudulent and void as against the judgment of defendants in error, declares said judgment, amounting with interest to over \$13,000, a prior and valid lien upon the lands in question, and directs that unless the defendants in the cross-bill, who are the plaintiffs in error here, their mother and their four sisters referred to, shall pay the same within ten days, the special master thereby appointed to execute said decree shall sell said lands to pay the same, with the usual provisions as to certificate thereof, and deed in default of redemption, and the unusual provision that if complainants in the cross-bill or any of them shall become the purchasers at such sale they shall be let into possession upon the approval of his report, subject only to the statutory right to redeem.

Pursuant to this decree the Special Master, on November 12, 1885, sold the lands in controversy, being 134 acres, to Andrew Russell, one of the complainants in the cross-bill, for \$65 per acre, or \$8,710 in all.

The claim of title paramount to the E. $\frac{1}{2}$ N. W. $\frac{1}{4}$ Sec. 9, set up in the amendment to the cross-bill, was clearly inconsistent with the claim also therein made, that complainant's judgment against Sampson Fanning was in equity a lien upon it, and the

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agreement recited in the decree to that effect, the acceptance of said decree, declaring it such a lien, and the purchase at the Master's sale under the same, are a clear and absolute abandonment of such claim. The validity of the redemption by plaintiffs in error from the sale to Epler, and of his certificate thereof, and of that of defendants in error set up in their cross-bill, are therefore not here involved. The decree stands in favor of complainants in the cross-bill treated as a creditor's bill, against the deceased administratrix, and some but not all of the liens of the original debtor, regarding the land as still in equity belonging to his estate and subject to said complainant's judgment against him. This is manifestly and directly contrary to the adjudication of this same question by the Supreme Court in another case between the same parties and by this court in this case, both of which are in full force. It is thereby established that these lands are not subject to said judgment, nor are these plaintiffs in error; and that they are personally liable upon their notes given for the land, except so far as that liability may have been extinguished by lawful means. The fact and law so established can not be changed by any agreement of Epler, or default of plaintiffs in error, or new or additional evidence, however taken, or any decree of the Circuit Court, without their consent.

The decree is therefore reversed and the cause again remanded.

Reversed and remanded.

ERNEST MYERS ET AL.

V.

TRUSTEES OF SCHOOLS.

Trusts—Jurisdiction of Equity to Take Charge of, when Necessary to Effect Objects—Wills—Bequest to School District.

1. A court of equity will not exercise its power to take charge of a trust and administer it when it appears that it is being properly administered.

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2. In the case presented, it is *held*: That the proceeds of a bequest to a certain school district "to be added to the principal of the school fund" thereof, are properly in the hands of the township trustees, and that the fact that the voters of said district do not constitute a majority of the voters of the township is not a sufficient ground for the appointment of special trustees.

[Opinion filed August 26, 1886.]

APPEAL from the Circuit Court of Calhoun County; the Hon. G. W. HERDMAN, Judge, presiding.

Messrs. BROWN & KIRBY and HAMILTON & SLATEN, for appellants.

It is the province and duty of a court of equity to appoint a trustee, or trustees, to take charge of and administer trusts given for charitable purposes under the direction and supervision of the court, in cases where the donor does not, by the terms of his will, appoint such trustee. *Henser v. Harris*, 42 Ill. 425; *Andrews v. Andrews*, 110 Ill. 223; *Jackson v. Phillips*, 14 Gray, 539; *Vidal v. Girard's Executors*, 2 How. 127; *Oulds v. Washington Hospital*, 95 U. S. 303; 2 Story, Eq. Jur., Secs. 1165-1170; 2 Perry on Trusts, Secs. 722-724.

The statute does not say that all gifts, grants, etc., shall go into the hands of the trustees, but only that they may receive them. The word "may" does not mean must or shall in connection with this fund. *Fowler v. Pirkins*, 77 Ill. 271.

Mr. T. J. SELBY, for appellee.

WALL, J. This was a bill in chancery, filed by the appellants against the appellees, from which it appeared that Benjamin Keck, a resident of Calhoun County, died testate, December 16, 1871. The important provision of his will was the following:

"I give and bequeath all my personal estate, goods and chattels, of what nature or kind soever, to the citizens of School District No. (2) two, Township No. (13) thirteen, south, range (1) one, west of the fourth principal meridian in Cal-

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houn County and State of Illinois, to be added to the principal of the school fund of said subdistrict No. (2) two, to be used exclusively as principal, so that it may be a perpetual fund for the use and benefit of the children of said district forever: *Provided*, that the interest accruing from said fund shall be used as other interest, for defraying the current expenses of the school or schools of said subdistrict."

The bill alleges that there are but two school districts in this township, and that a large majority of the legal voters of said township reside in District One, and the majority of the trustees of schools of said township are now, and have been for many years last past, residents of said District One, and that said majority of said Board have the appointment of the Treasurer of Schools of said township, and that the appellants, and the other citizens of District No. 2, who are *beneficiaries* and *cestuis que trust* of said trust fund, are excluded from the management and control of said fund; that the fund is placed under the control and direction entirely of those who have no interest whatever therein; that it now amounts to about \$12,000, and is in the hands of the Township Treasurer, appointed by said Board of Trustees, and that a feeling of very great anxiety for the preservation of this fund, and for its application to the purposes for which it was intended by the donor. The complainants, for *themselves and as representing the other citizens of District No. 2*, ask the court to appoint, as trustees of said fund, three of the citizens of said District No. 2, and that said trustees appoint a treasurer, requiring him to give bond in double the amount of said fund, and that said trustees manage, control and disburse said trust fund, under the supervision and direction of the Chancellor of said Circuit Court.

To this bill the appellees filed a general demurrer, alleging there was no equity on the face of the bill, and the court below sustained this demurrer and dismissed the bill.

Appellants assign for error the ruling of the court in sustaining the demurrer and dismissing their bill.

It is urged by appellants that upon the facts set up in the bill a court of equity will take charge of the fund, appoint a

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suitable trustee to administer it, and supervise the conduct of the trust. There is no difficulty in ascertaining who are the beneficiaries of the trust, nor in what way the fund is to be applied. The sole difficulty, if any there be, is in determining by whom it shall be executed. It will be noticed that it is given to the citizens of said school district, "to be added to the principal of the school fund" of the district, to be used as principal, so that it may be a perpetual fund for the use and benefit of the children of the district forever, and that the interest accruing from said fund shall be used as other interest for defraying the current expenses of the school or schools of said district. It is clear that when the testator says he wishes the money "added to the principal of the school fund," and the interest to be "used as other interest for defraying the current expenses of the schools" of the district, he had in mind the fact that there was then by law a fund of greater or less amount known as the "school fund" of the district in question, to which he wished to add this, and that he had in mind that there was in operation, with a charter for perpetual existence, a legal system through and by which the trust he was creating could be adequately administered. He is presumed to have known that by the express provision of the school law the Board of Township Trustees have power to receive a gift or devise for the use of any school or schools, or library, or other school purposes within their jurisdiction (Sec. 39); that by the same law (Sec. 40) it is the duty of the Township Board to cause all moneys for the use of the township and districts to be paid over to the Township Treasurer, who is declared to be the only lawful depositary and custodian of township and district funds, and that the treasurer is required to furnish bond in double the amount of the funds in his hands, and may be required to increase his bond from time to time, according to the increase of the notes, bonds, and effects in his custody. Secs. 55-57. It was his intention that the interest of the money should be used to defray the current expenses of schools in the district, and to that extent lessen the amount of taxation necessary for the purpose, and he must have known that his object could best be accomplished by giving the fund into the charge of those officials who were by law authorized to

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administer that part of the common school system, thus avoiding the conflict that might occur if it were placed in separate hands.

It would seem to be safer that the fund should be so disposed of than that it should be given over to the control of special trustees selected by the court. The risk of loss is in our judgment much less. It is not averred that there has been any maladministration or perversion, and the whole ground of complaint lies in the fact that because a large majority of the voters of the township are in District One, a majority of the trustees are chosen from that district.

The treasurer is appointed by the trustees, but for aught appearing he may reside in District Two. If the reason assigned were deemed sufficient for taking jurisdiction by a court of chancery, would it not be competent to show that by a subsequent increase of population in District Two it now contains a majority of voters of the township, and thus induce the court to relinquish its jurisdiction?

Will jurisdiction therefore depend upon the merely accidental circumstance of the relative voting strength of the two districts, and will the court be expected to assume and surrender the subject from time to time as the majority may shift from one side to the other, regardless of whether the object of the trust is being carried out according to the intention of the donor?

It is to be supposed that he foresaw such changes would occur, and that there was no reason to think a majority of the trustees would always reside in the district of his bounty. Yet he probably saw nothing in this to excite apprehension that his wishes would not be enforced; nor do we see, from anything suggested by the bill, that there is such danger.

Recognizing fully the power and duty of chancery to take charge of a trust and administer it whenever necessary to effectuate the object in view, and the readiness with which the action will be taken in a proper case, we are unable to say that this bill presents a case calling for such relief.

The decree of the Circuit Court, sustaining the demurrer and dismissing the bill, will be affirmed.

Affirmed.

Fletcher v. Patton.

JAMES B. FLETCHER

V.

MATTHEW PATTON.

Sales—Breach of Contract—Action to Recover Damages—Measure of Damages—Conflict of Evidence—Practice—Instructions.

1. Where the evidence is conflicting and there is enough to warrant the verdict, this court will not interfere.

2. In an action to recover damages for breach of contract for the sale of cattle, it is *held*: That proof of prices was properly limited by the court below to the period between the demand by plaintiff and the sale of the cattle to other parties by the defendant; that an instruction to the effect that the measure of damages is the difference between the contract price and what the cattle were worth at the time and place when and where they were to be delivered under the contract, was proper, in view of the evidence presented, and that another instruction is not open to certain objections depending on the evidence.

[Opinion filed August 26, 1886.]

APPEAL from the Circuit Court of Sangamon County; the Hon. JAMES A. CREIGHTON, Judge, presiding.

Messrs. ORENDORFF & PATTON and BRADLEY & BRADLEY, for appellant.

Even if evidence is conflicting, where there is a clear preponderance against the verdict of the jury, it should be set aside. *Janney v. Birch*, 58 Ill. 87; *Wade v. Atkins*, 58 Ill. 64; *C., R. I. & P. R. R. Co. v. Herring*, 57 Ill. 59; *Lincoln v. Stowell*, 62 Ill. 84; *Davenport v. Springer*, 63 Ill. 276; *Beldin v. Innis*, 84 Ill. 78.

“If the market is fluctuating, and especially if raised or depressed by temporary and transient causes, the market price on the precise day of delivery will not necessarily govern. The law in regulating the measure of damages contemplates a range of the entire market and the average of prices thus found, running through a reasonable period of time.” 2 Sutherland on Damages, 374.

Fletcher v. Patton.

Messrs. PATTON & HAMILTON, for appellee.

WALL, J. The appellee recovered judgment against the appellant for \$700 for an alleged breach of contract in the sale of 103 head of beef cattle. The appellee's claim was that on the 22d of May, 1884, he made a contract with appellant by which the latter sold to the former the cattle in question at \$5.75 per hundred gross, to be delivered at any time between June 25th and July 15th, at the option of appellee; that he demanded them on the 3d of July, but that appellant repudiated the trade, and on the 7th of July sold and delivered the cattle to other parties. The price of such cattle advanced after the trade and this suit was for the damages sustained by appellee in not getting the cattle according to contract.

The appellant insisted that the bargain was conditional, that he had not seen the market reports for several days, and not knowing whether prices had changed, he was careful to make the condition that he would sell at the price named only in the event there had been no advance and that the trade should not be final until he could get his mail and learn the state of the market.

He insisted further that appellee promised to get his (appellant's) mail for him and leave it at a certain place on his farm that evening, which was not done.

The real controversy is as to the bargain, whether it was absolute or conditional, and upon this question the whole case turns.

There was considerable conflict in the evidence, and while perhaps the jury might have found either way, there was certainly enough to warrant the verdict. It is urged in the brief that the court erred in confining the proof as to prices to the period between July 3d, when the demand was made, and July 7th, when appellant put it out of his power to comply with the contract. This view was apparently acquiesced in, if not approved, by counsel for appellant, and we do not find that it was objected to.

Be this as it may, we see no objection to it in point of law.

Haldeman v. Sennett.

The contract was that at the option of appellee he might take the cattle any time between June 25th and July 15th, and he was entitled to any profit there might have been in them at any time after demand made between those dates.

It is next objected that by the instructions the jury were authorized to measure the damages by the range of the market between June 25th and July 15th. This position, rather inconsistent with the last, is not well taken.

After stating the case hypothetically, according to plaintiff's theory, the instructions advise the jury that the measure of damages would be "the difference between the contract price and what the cattle were worth at the time and place when and where they were to be delivered under the contract." This referred to the time when demand was made, July 3d, and as the evidence as to prices was confined to the period between that day and July 7th, we do not see what there is here for appellant to complain of.

It is objected to the second instruction that it assumes a demand had been made according to contract when the opposite was true. We think it does not so assume, nor do we find the instruction subject to the further objection urged by counsel that there is no evidence in the record upon which to predicate it.

We are of opinion the instructions fairly presented the law applicable to the case. The judgment of the Circuit Court is affirmed.

Affirmed.

MARGARET A. HALDEMAN

V.

PERRY F. SENNETT.

Practice—Conflict of Evidence—Books—Instructions.

1. Where the evidence is conflicting and there is enough to warrant the verdict, this court will not interfere.
2. This court will not reverse a judgment for errors which could not have injured the appellant.

Haldeman v. Sennett.

[Opinion filed August 26, 1886.]

APPEAL from the Circuit Court of McLean County; the Hon. O. T. REEVES, Judge, presiding.

MESSRS. TIPTON & BEAVER, for appellant.

MR. FRANK R. HENDERSON, for appellee.

WALL, J. This was an action of assumpsit to recover a balance of \$40.39, claimed by the plaintiff. The pleas were non-assumpsit and set-off. The verdict of the jury was for \$16.33 in favor of defendant against plaintiff on the plea of set-off and the court denying a motion for new trial rendered judgment accordingly. As to the objection that the evidence required a different verdict we will only say that while the conflict on some points was such that the finding might have been otherwise, there was enough to warrant the verdict, and applying well settled rules, there is nothing in this to call for a reversal.

As to the objection that the court erred in refusing to permit the plaintiff's books to go in evidence it may be said that there is no doubt the only items in plaintiff's account which were disputed were entered upon the books. This was testified to by the plaintiff's agent, and by consent a transcript from the book containing plaintiff's account was given to the jury. It follows that whether the books were competent or not the plaintiff has not been injured in this respect. Sundry exceptions were saved to the action of the court in giving and refusing instructions. It would require more space than the occasion demands to state in detail all the points included in these exceptions. We have examined the case with care and we are satisfied the law was given to the jury with all necessary fullness and accuracy.

We have no reason to suppose that a different result would have been produced by different rulings so far as different rulings would have been proper and therefore we must decline to set aside the judgment on this ground.

It will be affirmed.

Affirmed.

Humphreys, Newton & Co. v. Swain.

HUMPHREYS, NEWTON & COMPANY

v.

HENRY S. SWAIN.

21	232
42	371
21	232
56	70

Execution Issued before Entry of Judgment, Void—Admissibility of Evidence to Show Such Issue.

1. An execution issued before the entry of the judgment is void, and a subsequent entry will not validate it.

2. Parol evidence is admissible to show that the execution was issued and in the hands of an officer before the entry of the judgment.

[Opinion filed August 26, 1886.]

APPEAL from the Circuit Court of McLean County; the Hon. O. T. REEVES, Judge, presiding.

Statement of the case by WALL, J. This was replevin brought by appellants against appellee. The case was tried once before and appealed to this court, and judgment reversed. 15 Ill. App. 451.

Arnsperger and Lovell were the owners of the property in controversy, which consisted of a stock of groceries. They bought goods of appellants, who were wholesale merchants, and gave them a chattel mortgage on the property in controversy and the fixtures in the same store to secure the purchase money. After the mortgage was properly acknowledged and recorded J. S. Arnsperger and S. R. Lovell gave two joint and several judgment notes to N. N. Winslow for Lovell's private debt as alleged, one for \$500 and one for \$200. Shortly afterward, on the 26th of December, 1883, in vacation, Winslow, by his attorney, filed in the office of the circuit clerk a declaration and cognovit on such notes. The clerk marked them filed at once, issued an execution, handed it to Mr. Hughes, plaintiffs' attorney, who at once handed it to the Sheriff, and levy was made immediately. After that the clerk wrote up the judgment. When the levy was made appellants brought this suit in replevin to recover the property.

To the declaration appellee filed a number of pleas; the 5th was property in defendant, 7th, justification as Sheriff. To the 7th plea appellants filed several replications: 1st, denying the rendition of the judgment justified under; 2d, that the judgment was rendered on two promissory notes executed by S. R. Lovell to Winslow for Lovell's private debt, and signed by Arnspiger in his individual capacity as surety for Lovell; that the firm of Arnspiger and Lovell, as a firm, were indebted to the plaintiffs (appellants), and gave the chattel mortgage on said property, which was partnership property, to secure such partnership debt.

To the last replication appellee rejoined that the Winslow judgment was rendered for the partnership debt of Arnspiger and Lovell. To the other rejoinders the court sustained demurrers. So the issues were, 1st, on the plea of *non cepit* and *non detinet*, to which similizers were filed; 2d, that there was no such judgment in favor of N. N. Winslow, as he had described; 3rd, that the supposed judgment in favor of N. N. Winslow was for Lovell's private debt.

The case was submitted to the court without a jury, the evidence heard, and judgment rendered in favor of appellee, from which this appeal was prosecuted.

Messrs. A. E. DEMANGE and BENJAMIN D. LUCAS, for appellants.

That the court erred in excluding all the evidence of the issue of the execution before the entry of the judgment, is settled beyond controversy. *Ling v. King*, 91 Ill. 571; *Cummins v. Holmes*, 109 Ill. 15; *Baker v. Barber*, 16 Ill. App. 621.

The strictest application of the rule that records import verity, would not exclude the testimony offered. The record can import nothing that does not appear from the record itself, and it does not appear from this record whether it was written up before or after the execution was delivered to the Sheriff.

Mr. WILLIAM E. HUGHES, for appellee.

Humphreys, Newton & Co. v. Swain.

Parol evidence that a recital in the record is not true is inadmissible. *Sherman v. Smith*, 20 Ill. 350.

The date of the judgment can not be contradicted by parol evidence. *Wiley v. Southerland*, 41 Ill. 25.

All questions relating to the time when it was in fact made must be settled by the record alone, and parol evidence is not admissible to impeach it. *Herrington v. McCollum*, 73 Ill. 476.

In the case of *Cummins v. Holmes*, 109 Ill. 15, relied on by appellants, there was no record of the judgment at all. An execution was issued without any judgment to support it, and of course the levy failed. An execution without a judgment, whether issued on a confession in term time or out of term, would be void.

The *Baker* case, 16 Ill. App. 621, is not supported by the decisions of the Supreme Court.

WALL, J. The Circuit Court declined to consider the testimony offered by appellants tending to show that the execution was issued by the clerk before the judgment was actually entered up. It is contended by appellee that such proof is not competent because its effect is to impeach a record which imports verity. It is conceded that an execution issued before the entry of judgment is void, may be questioned collaterally, and a subsequent entry will not validate it. *Ling v. King*, 91 Ill. 571; *Cummins v. Holmes*, 109 Ill. 15.

It was expressly held in *Baker v. Barber*, 16 Ill. App. 621, that parol evidence may be heard to prove that the execution was issued and in the hands of the Sheriff before the judgment was in fact written up, although upon the same day, and that this does not contradict the record. We are disposed to adhere to this ruling.

The judgment of the Circuit Court will therefore be reversed and the cause remanded.

Reversed and remanded.

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21	235
45	631

GEO. NEINSTEIL, WM. CREVISTON AND J. C. SPEELMAN
V.
WILHELMINA SMITH.

Defective Bridge—Action for Damages—Liability of Highway Commissioners—Instructions.

1. In an action against Highway Commissioners to recover damages for injuries caused by a defective bridge, it is held that instructions, from which the jury no doubt inferred that the defendants were bound to know the danger and provide against it, are too broad.

2. It seems that Highway Commissioners are not to be regarded as knowing what they might have ascertained as to the dangerous condition of a bridge; that in the discharge of their official duties they are only required to exercise their judgment as reasonably prudent men, and that the duty in question was something more than ministerial in character.

The case of *Tearney v. Smith*, 86 Ill. 391, distinguished.

[Opinion filed August 26, 1886.]

APPEAL from the Circuit Court of Douglas County; the Hon. J. H. HUGHES, Judge, presiding.

Messrs. CRAIG & CRAIG, for appellants.

Mr. A. C. FICKLIN, for appellee.

“The work of constructing or repairing a public highway is not a judicial but a ministerial act, and must be performed with a proper regard to individual rights as well as the public accommodation. Commissioners of Highways are only in a very limited sense judicial officers. Repairing a highway is not of that character. For the negligent performance of ministerial acts, they are personally responsible if injury results to others.” *Tearney v. Smith*, 86 Ill. 391, 395.

Commissioners of Highways are individually liable for injuries resulting from a negligent performance of their duty. *McCord v. High*, 24 Iowa, 336, 350; *Hover v. Barkhoof*, 44 N. Y. 113; *Robinson v. Chamberlain*, 34 N. Y. R. 389; *Hum-*

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phreys v. County of Armstrong, 56 Pa. 204; Garlinghouse v. Jacobs, 29 N. Y. R. 297; Tearney v. Smith, 86 Ill. 391.

WALL, J. The appellants were Commissioners of Highways. They were notified that a bridge over a stream in their township was in an unsafe condition and they took steps to repair it. About 200 feet of new work was put over the main channel of the stream, leaving the old parts at the north and south ends with which the new part was connected, and the bridge was then thrown open to public use.

A few weeks later the appellee, while riding over it in a wagon, was injured by the giving way of the old part at the north end, and to recover damages brought this suit. There was a verdict for plaintiff for \$100 and judgment was entered thereon.

The declaration charges that the defendants, knowing the defective condition of the bridge, permitted it to be used by the public. The evidence shows that it was the intention to replace the old part at the north end with a grade or embankment, but as such work could not be done at that season of the year, the ground being frozen, it was a question whether this old part could be used until the grade could be put in. The evidence tends to show that this was reasonably safe and that it sustained the burden of heavy loads, and the Commissioners were of opinion, as no doubt were many others, that it was sufficient for all ordinary purposes and that it might be used with safety for the time designed.

The court in its written instructions and in its oral remarks before the jury treated the defendants as liable for the injury if they knew of the dangerous condition of the bridge. It can hardly be said there was evidence upon which to predicate this proposition. The defendants knew only what could be gained from observation, though possibly had they pursued the investigation far enough and carefully enough they might have discovered what subsequently appeared. In a certain sense they did know the condition, that is, so far as it was apparent. Are they to be regarded as knowing what they might have ascertained?

The jury no doubt so understood—that they were bound to know the danger and provide against it. This was the plain inference to be drawn from the expressed views of the court.

It is assumed that such is the teaching of *Tearney v. Smith*, 86 Ill. 395. In that case the Commissioners of Highways were sued for so negligently digging a ditch as to overflow the lands of the plaintiff. Negligence was charged, and as the court held, very clearly proved, and the inquiry was whether there was liability. The court held affirmatively, and in the course of the opinion remarked that the work of constructing or repairing a highway is not a judicial but a ministerial act, and must be performed with a proper regard to individual rights as well as the public accommodation. This, if applied literally to the case at bar, might be quite misleading. The difference in the cases must be noted. In the present case the defendants are liable, if at all, because they were mistaken as to the condition and strength of the old part, and suffered its renewed and continued use by the public. There was an error of judgment. There was no actual knowledge by them or by any one that the timbers were as rotten as they proved to be, though it was known that they were old, and of course not as good as new. These Commissioners had a peculiar duty to perform. The duty was somewhat imperfect and indefinite. Various considerations—the immediate need of the bridge, the condition of the funds, the most judicious mode of making the improvement, and perhaps others—were to be taken into account, and the situation involved something more than a mere ministerial function. The exercise of judgment was called for, and it is the mistake therein committed upon which this action is based. As was said in *Pickerell v. Kunst*, 15 Ill. App. 461, the law pertaining to the subject is somewhat unsettled, but the action whenever allowed is grounded upon the neglect of some official duty, upon the performance of which the safety of the individual in respect to person or property depended. If it be conceded that for the negligent performance of duty the Commissioners were liable, and if the performance of duty in-

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volved the exercise of judgment, it must be true there was no actionable negligence, if, being reasonably prudent men, they discharged the duty according to their best judgment.

They did not guarantee the safety of their bridges. The law imposes no such obligation.

Responsible and careful men are wanted for such positions but would not accept them if they knew they could be so held. 1 Ch. Pl. 77; Hilliard on Torts, Ch. 29; Shearm. & Red. on Negligence, 166-169 and notes.

We think the jury were misled by the views of the court. The instructions should be limited and qualified as indicated herein.

The judgment will be reversed and the cause remanded.

Reversed and remanded.

21	238
65	57
21	238
88	611

GEORGE W. TEMPLE

V.

INGAR FREED.

Exemptions—The Wife may be the Head of the Family.

When the wife has, in fact, become the head of the family by taking exclusive charge and control of its earnings and the financial and business interests necessary to support and keep it together, although her husband resides with her, she is entitled to the benefit of the exemption laws as the head of the family.

[Opinion filed August 26, 1886.]

APPEAL from the County Court of Champaign County; the Hon. J. W. LANGLEY, Judge, presiding.

Mr. FRANCIS M. WRIGHT, for appellant.

Mr. J. O. CUNNINGHAM, for appellee.

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CONDER, J. The principal question raised by this record is can a married woman living with her husband, under any circumstances, be regarded as the head of the family, and as such entitled to claim her property as exempt from execution to the extent of \$400, as provided by Sec. 13, Chap. 52, Revised Statutes. "Ordinarily, at least, where the wife lives with the husband, he must be regarded as the head of the family. If, in fact, he has not control of the family and is not the head thereof, such fact must be shown by proof." *Clinton v. Kidwell*, 82 Ill. 429.

We think this legal presumption may be overcome, and when the evidence satisfactorily establishes in a given case that the wife becomes in fact the head of the family by taking exclusive charge of, managing and controlling the earnings and productions of the family, and the financial and business interests necessary to support and keep it together, she is entitled to the benefit of the exemption laws as the head of a family.

The evidence shows that the husband of appellee had been insane, and as such confined in the county jail and the hospital for the insane; but at the period in question in this suit, was so far recovered as to live at home with his wife and children.

Substantially, however, he did nothing toward his own support or that of the family, while appellee, with the assistance of her children, carried on the farm upon which they lived, herself plowing corn, raking and binding wheat, and taking the actual control and management of the farm, buying the provisions, and selling the produce raised upon it, thereby, as we think, making herself the head of the family.

We do not deem it necessary to notice the numerous other errors assigned upon the record, as we think the case was decided correctly, if the views we entertain in reference to appellee's right to be regarded as the head of the family, are sound.

The judgment of the County Court will therefore be affirmed.

Affirmed.

Trogden v. Safford.

ANDREW Y. TROGDEN

V.

STEPHEN SAFFORD ET AL.

Foreclosure of Mortgage—Waiver of Objection to Amount of Decree—Homestead—Surplus Proceeds of Sale, Protected—Judgment of Justice, Dormant after Seven Years—Filing of Transcript.

1. A mortgagee, by enforcing a decree of foreclosure by a sale of the mortgaged premises, waives any objection to the amount therein decreed to him.

2. Where the mortgagee purchases the homestead of the mortgagor at a sale under foreclosure, he can not apply the surplus on other claims against the mortgagor, as to which the right of homestead has not been waived.

3. The filing of a transcript of a Justice's judgment with the Clerk of the Circuit Court more than seven years after it was rendered, creates no lien.

[Opinion filed August 26, 1886.]

APPEAL from the Circuit Court of Edgar County; the Hon. J. H. HUGHES, Judge, presiding.

Messrs. A. Y. TROGDON and R. L. MCKINLAY, for appellant.

Messrs. A. J. HUNTER and SELLAR & DOLK, for appellees.

CONGER, J. This was a bill to foreclose a mortgage filed in the Edgar Circuit Court, and on the 3d day of November, 1883, a decree was entered in favor of appellant for \$236.22, with interest thereon from September 15, 1883, with decree of sale, and an order that the master bring the surplus, if any, into court to abide the further order of court.

On December 22, 1883, the master sold the property for \$432.85 to appellant, which amount paid the decree in full and all costs, and left \$100 of a surplus in the hands of the master subject to the order of the court.

At the March term, 1884, appellant filed a supplemental

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bill praying that said surplus of \$100 be paid to him as the assignee and owner of certain judgments against Safford, which petition was afterward dismissed, and such surplus ordered to be paid to Safford.

The Judge's certificate of the evidence certifies that the premises involved in the controversy were at the commencement of said suit, and were then occupied by said Safford and his wife as a homestead.

We are asked to look through the testimony of a large number of witnesses upon the question whether the original decree was for the right amount. We decline to do this, as appellant has, by bringing the property to sale and buying it in under his decree, confirmed it, at least so far as he is concerned.

If he had been dissatisfied with the amount decreed him by the court, he should have had such decree reviewed before enforcing it by a sale.

The mortgaged premises being a homestead, it is clear that to the extent of \$1,000 they would be entirely free and clear from the lien of any judgments against Safford, either at law or in equity. Appellant, because he held a mortgage upon the premises in which the homestead had been waived, was entitled to have his mortgage satisfied by a sale of the premises, but could not, by bidding more than was due on his decree, use any surplus to apply on other claims or judgments as to which the homestead right had not been waived.

It is insisted, however, that these judgments were a lien upon the property before they became a homestead. This is a mistake.

The court finds the premises were the homestead of Safford and wife, or rather, certifies that it was so conceded upon the trial, which will have the same effect as a finding from evidence at the date of the mortgage, February 19, 1875. The Love judgment was rendered by a Justice of the Peace July 2, 1868, and a transcript was filed with the Circuit Clerk July 29, 1875, at which time, if ever, it would become a lien, and which was some months after the execution of the mortgage. But the transcript having been filed more than seven years

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after the rendition of the judgments, it was worthless and created no lien. We held in *Pierce v. Wade*, 19 Ill. App. 185, that a Justice's judgment became dormant at the expiration of seven years from its rendition.

The Bishop-McKinlay judgment was rendered in 1877, more than two years after the date of the mortgage, and a transcript thereof filed January 6, 1883, so that in this case neither judgment nor transcript existed until long after the premises became a homestead.

The \$100 surplus belonged to Safford and the court below did right in ordering it paid to him.

The decree of the Circuit Court will be affirmed.

Affirmed.

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY

V.

A. H. GERNAND.

Railroads—Action to Recover Damages for Killing Horses—Review of Evidence—Practice—Discretion.

1. In an action against a railroad company to recover damages for the killing of four horses, in which the question involved is, whether the injury was caused by the defective condition of a gate at a farm crossing, this court, upon a review of the evidence, sustains a verdict for the plaintiff.

2. The fact that the trial court permitted the plaintiff and another witness to be recalled, after the defendant had rested, to testify as to the condition of the gate, on the Saturday before the trial, is not a sufficient ground for a reversal, the evidence not being especially harmful and the time of its introduction being within the discretion of the court.

[Opinion filed August 26, 1886.]

APPEAL from the Circuit Court of Vermilion County; the Hon. J. W. WILKINS, Judge, presiding.

Statement of the case by CONGER, J. This was an action on the case for damages which the appellee claims to have sustained

by the killing of four horses. During the night preceding the 8th of August, 1884, the four horses in question belonging to the appellee, owing to some defect in the fence surrounding the premises in which they were pasturing, got out into the public road, went east about a quarter of a mile along said public road and beyond the place where the railroad crossed the same, where they, by some means, got into the inclosed premises of George Evans lying east of the railroad track, and immediately west of said highway; which was, and had been, used that summer for the purpose of raising grain, hay, etc., but in which no stock was then kept. After getting into this inclosure the horses seem to have passed in a southwest direction until they found their way to a farm crossing wholly within the inclosed premises of said Evans, and passing through the gate on the east side of said crossing, they succeeded in getting upon the railroad company's right of way where they were killed by a train going north, about one o'clock in the morning.

The declaration counts upon the statutory liability of the appellant for failing to properly fence its tracks, and also upon the common law liability on account of negligence in the manner of running its trains.

Plea of general issue; trial by jury, verdict and judgment for the plaintiff, for \$600, from which defendant appeals.

Mr. WILLIAM ARMSTRONG, for appellant.

It was absolutely essential, in order to entitle the plaintiff to a verdict, that he should prove a state of facts which would render the defendant liable under the statute for failing to erect or maintain a suitable fence and gate at the farm crossing in question and that the failure so to do was the proximate cause of the horses getting upon the track; or that the defendant's agents were guilty of negligence in the manner of running of the train after they had discovered the horses upon the track.

Where there is evidence of contributory negligence it is error to instruct the jury that if they found the fence was defective the company was liable. C., B. & Q. R. R. Co. v. Seirer, 60 Ill. 295.

The law of this State does not require railroad companies to

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fence their track against breachy horses. All that is required is that they shall fence against stock that ordinarily come in contact with their fences. The word breachy hardly admits of comparison and a breachy animal is not one against which railroads are required to fence.

Mr. G. W. SALMANS, for appellee.

CONGER, J. The controversy in this case is one purely of fact, whether the appellant was liable for the injury caused to the horses of appellee or not, by reason of the defective condition of the gate at the farm crossing through which the horses passed and which gate it was the duty of appellant to keep in suitable repair.

We have carefully examined the evidence and think the jury were fully warranted in finding that the gate was in such a defective condition as would make appellant liable, and that according to every reasonable probability, because of such defect, the horses themselves pushed it open and thus got upon the track and were killed.

Objection is made that the court erred after appellant had rested its case, in permitting the appellee and another witness to be recalled by appellee and testify what the condition of the north gate was on the Saturday before the trial.

We can not see that the matter of this evidence could do any great harm, and as to the time when it was offered, it was discretionary with the court trying the case.

Neither do we regard the instructions as subject to the criticisms made upon them.

We are satisfied with the verdict of the jury and think it was sustained by the evidence. The judgment will be affirmed.

Judgment affirmed.

NOTE.—A petition for a rehearing in this case was denied.

Newby v. Commissioners of Highways.

DAVID E. NEWBY, BY HIS NEXT FRIEND, DAVID BURTON,
V.
COMMISSIONERS OF HIGHWAYS.

Injunctions—A Wrong merely Apprehended, not a Ground for an Injunction—Bill to enjoin Highway Commissioners from Opening a Road—Invalid Order—Mistake—Evidence—Recitals—Remedies.

1. An injunction will not be granted to prevent wrong in the abstract, a wrong that is only nominal or theoretical in character, or a wrong that is merely apprehended by the petitioner.

2. Upon a bill filed to enjoin Highway Commissioners from opening a highway over the complainant's land, it is held that the sworn answer and personal testimony of the defendants, admitting the invalidity of an order establishing the road and disclaiming all right and intention to enforce it, overcame any presumption of intention to open the road that might arise from the mere existence of the order.

[Opinion filed August 26, 1886.]

APPEAL from the Circuit Court of Clay County; the Hon. C. C. BOGGS, Judge, presiding.

Messrs. COCKRELL & MONROE, for appellant.

Messrs. COPE & CHESLEY, for appellees.

PLEASANTS, P. J. Appellant, an infant of ten years, residing in Indiana with his grandfather, the said David Burton, filed the bill herein to enjoin appellees and their successors from opening a highway on the route therein described. It avers that he was and is the owner of a forty-acre tract over which said route runs, but was not so designated as referred to in the petition for the establishment of the highway; that his damages have not been released, agreed upon or assessed, nor the right of way over his said land granted, and that the defendants are nevertheless attempting to operate said road as a

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public highway and subject his land to the servitude thereof without compensation. An answer was filed, under oath as required, and a replication thereto, and on final hearing upon the pleadings and proofs the bill was dismissed, and complainant took an appeal to this court by agreement.

It was admitted, substantially by the answer and formally upon the hearing, that he was the owner of the land in question, that the Commissioners had not obtained the right to take it, that the road had been opened by them through its entire length, about a mile and three quarters, and was now open, except upon the premises of the complainant.

The bill further avers that the right of way was never obtained over other lands of owners designated in the petition—the heirs of Moses Johnson and of J. H. Alexander; that two days before the bill was filed one of complainant's solicitors upon careful examination, was unable to find in the Town Clerk's office a record of any proceedings for the establishment of the road except the said petition, and was informed by the clerk that the original papers pertaining to it were then in possession of the defendant Kepley.

It appears, however, that a plat and report of survey of said road, with a final order reciting the receipt of the petition, lawful notice given of the time and place fixed for examining the route and hearing reasons for and against the laying out of the road, the determination to grant the prayer of the petition and the ascertainment and release of all the damages to land owners, and declaring the road established as a public highway, was actually filed in said clerk's office September 11, 1884. Their introduction was objected to for the reason that said order bore date August 6th, being more than five days before it appeared to have been filed, but the report and plat, made a part of it, bore date August 22d, showing a mistake in that of the order which the court properly permitted to be corrected by parol evidence that it was really made and should have been dated September 6, 1884. And as nothing to the contrary appeared, its recitals were sufficient evidence, in this collateral proceeding, that the Commissioners had observed the requirements of the statute in respect to the facts

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so recited. *Shinkle v. Magill*, 58 Ill. 422; *Frizell v. Rogers*, 82 Ill. 109.

But if the proceedings were regular in all other respects the admitted facts show that the Commissioners had no jurisdiction of complainant's person, and the order, so far as it purported to affect his land, was void. It may therefore be conceded that if they were attempting or threatening or claiming the right by virtue of these proceedings, to take his land, injunction was his proper and rightful remedy. *Commissioners of Highways v. Durham*, 43 Ill. 87; *City of Peoria v. Johnson*, 56 Ill. 45; *Carter v. City of Chicago*, 57 Ill. 283; *Trustees v. Walsh*, 57 Ill. 363; *Frizell v. Rogers*, 82 Ill. 109; *Bryan v. City of East St. Louis*, 12 Ill. App. 390.

Such, however, was not the fact. It appears that complainant's mother was named in the petition as owner, and that she had purchased the land and was then in possession and control of it. The petitioners doubtless supposed she had the title, though the deed she took was to her son, and on record. But it seems the Commissioners, before making the order, must have received information that he had or claimed some interest in it, since a release of damages which was executed by several others of the land owners was prepared to be executed also by E. W. Isom as agent of complainant, and was so signed by him in the body of the instrument (parenthetically). They also afterward took a release from his mother referring to the land as hers; from which it may be inferred that they supposed she had the interest of a widow, and he of an heir; or that Isom could lawfully release for him as "agent" or, that his mother was his guardian and that her release would cure the defect and suffice to give them the right of way.

However much of ignorance there may have been on their part there does not appear to have been any bad faith. They yielded to his right as soon as they were advised of it.

The road, as declared to be established, was of the width of forty feet; its center line along this land was a division fence between it and that of Mr. Chrisby. Mrs. Newby, complainant's mother, had caused this fence to be moved back twenty feet, by which the road was opened. Afterward Chrisby

Newby v. Commissioners of Highways.

ran his fence across the strip and joined on to complainant's. The Commissioners gave him notice to remove it, and upon his refusal they tore it down. He replaced it, and then, by what they learned in this controversy with Chrisby, they were put upon inquiry as to complainant's rights. The defendant Kepley thereupon went to Indiana, where complainant and his mother were then residing, and upon learning from them that she had no interest in the land and was not his guardian, the Commissioners desisted from all attempts to take or use it.

And this was before the filing of the bill herein. The answer states that "these defendants have no purpose to open said road except in conformity with the law, and are ready and willing to pay whatever damages, if any, said David E. Newby may be entitled to. The failure to obtain the right of way over the land in controversy is an accident or omission resulting from mistake as to the ownership of said land." On the hearing they testified without contradiction to the facts above stated, and that they have never done or threatened to do anything toward taking the land since thus learning the title, and have no intention to do so without first making lawful compensation.

The only relief prayed is injunction. The ground of it is the alleged attempt or threat to take complainant's land without right, under the proceedings referred to, and impending when the bill was filed. We regard the answer as a denial of the allegation last mentioned, and disclaimer of all right or purpose so to take it, or otherwise without right first obtained. Having been called for under oath and being sworn to, this is evidence of the facts therein stated. It is fully supported by other proof and is not now denied. What more does the complainant need? All the right he claims is fully conceded, and was before he brought his suit. No substantial harm had come to him from what the defendants had previously done through mistake of fact or ignorance of law, nor was any danger of its coming then impending.

Injunction will not be granted to prevent wrong in the abstract, or that is only nominal or theoretical in its character, or

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because of the mere apprehension of the petitioner that a wrong may be done. High on Injunction, Sec. 1; Wait's Actions and Defenses (2d Ed.), Vol. 3, p. 689. Nor will this relief be extended in any case beyond what is necessary for the protection of his rights. Wait's Actions and Defenses (2d Ed.) Vol. 3, p. 685; citing Gallaton v. Oriental Bank, 16 How. (N. Y.) 253; Shrewsbury v. Stour Valley R'way Co., 21 Eng. L. and Eq. 628, 636.

It may be that the existence of the order establishing the road would of itself justify an injunction, as affording a presumption of an intention to open the road. But this presumption is overcome by the sworn answer and personal testimony of the Commissioners admitting its invalidity, and disclaiming all right and intention to enforce or pursue it against complainant. High on Injunction, Sec. 10; United States v. Duluth, 1 Dillon, 469. In the case last cited Mr. Justice Miller states the rule to be that "when the damage or injury threatened is of a character which can not be easily remedied if the injunction is refused, and there is no denial that the act charged is contemplated, the temporary injunction should be granted unless the case made by the bill is satisfactorily refuted by the defendant." The same seems to be recognized by our own Supreme Court in Trustees, etc., v. Walsh, 57 Ill. 366.

We think it would be an abuse of this extraordinary remedy to apply it in such a case as is here shown, and the decree of the Circuit Court will be affirmed.

Decree affirmed.

M. T. VAUGHN

v.

SILAS OWENS.

21	249
47	001
21	249
90	387

Sales—Growing Crops—Possession—Replevin to Recover Property Held by Constable—Official Character of Defendant—Evidence.

1. Upon a sale of a growing crop the title and possession pass to the vendee.

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2. The purchaser of a growing crop of corn, where the quantity is considerable, may have it cribbed on the premises where grown, without subjecting it to levy for the debts of the vendor.

3. In the case presented, it is held, that the evidence shows a complete sale of the corn in question while growing, although it was to be gathered and cribbed by the vendor and the quantity was then to be ascertained or agreed upon by the parties.

4. Where the defendant, in an action of replevin, defends on the ground that he was a Constable and took the property in question by virtue of an execution and the direct question of his official character is raised, he must show that he was a Constable *de jure*. Evidence that he was an acting Constable is inadmissible.

[Opinion filed August 26, 1886.]

APPEAL from the County Court of De Witt County; the Hon. G. B. GRAHAM, Judge, presiding.

Messrs. MOORE & WARNER, for appellant.

The absolute unconditional title to the property in question became vested in the appellant, September 22, 1885. *Graff v. Fitch*, 58 Ill. 373; *Shelton v. Franklin*, 68 Ill. 333; *Straus v. Minzesheimer*, 78 Ill. 492; *Benjamin on Sales*, Sec. 331.

Where a person, claiming to be an officer, attempts to justify his acts done by virtue of his office, he must prove himself an officer *de jure*. *Schlencker v. Risley*, 3 Scam. 483; *Case v. Hall*, 21 Ill. 632; *Outhouse v. Allen*, 72 Ill. 529.

Messrs. FULLER, MONSON & INGHAM, for appellee.

Upon the sale of growing crops, actual possession need not be taken by the purchaser until they are matured, but when the crop arrives at maturity the purchaser must then be diligent and take the actual possession of the same within a reasonable time. *Thompson v. Wilhite*, 81 Ill. 356; *Bull v. Griswold*, 19 Ill. 631.

The pretended symbolical delivery was not made until ten days, according to Vaughn, and forty days, according to Hendrix, after the crop matured. That showed no diligence on Vaughn's part. Even ten days is not a reasonable time within which possession should have been taken, or attempted to be taken. A delay of more than one day in taking possession

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would certainly have been laches and defeated his right, considering that the corn was so near the premises and so susceptible of actual possession by removal or otherwise. *Arnold v. Stock*, 81 Ill. 407; *Reed v. Eames*, 19 Ill. 594; *Wooley v. Fry*, 30 Ill. 158; *Reese v. Mitchell*, 41 Ill. 365; *Cass v. Perkins*, 23 Ill. 382.

CONGER, J. On the 22d day of September, 1885, one H. A. Hendrix was indebted to appellant in the sum of \$30. Appellant was also surety for Hendrix upon the latter's note to other parties for \$123.20 and interest. On that day appellant and Hendrix met on the farm near where the corn of Hendrix was growing, and appellant proposed to purchase it of Hendrix at the price of 20 cents a bushel, Hendrix to gather and crib the corn on the farm of appellant, lying just across the road from the place on which the corn was growing, or on the land where the corn was growing if he could find enough rails there to crib it; and when the corn was so gathered and cribbed, the total amount to be ascertained or agreed upon by the parties, and then to be paid for at the rate of 20 cents per bushel, by appellant surrendering to Hendrix his note of \$30 and paying off the note of Hendrix, of \$123.20, upon which appellant was surety, and the difference between these two amounts and the total price of the corn, to be settled in cash, whichever way it should be. Hendrix said, "It is a trade; it is your corn."

Hendrix gathered the corn and cribbed it on the place where grown, as he says, from the 1st to the 15th of October, while appellant states that it was gathered from the 1st to the 15th of November, and from the circumstances we are inclined to think the date fixed by appellant to be the correct one. On the 25th of November, 1885, Hendrix and appellant met and estimated the corn, which was contained in two cribs, at 700 bushels, the \$30 note was delivered up, and they agreed that when appellant paid off the note upon which he was surety, the difference in money could be paid. Appellant did pay off said security debt December 24, 1885.

A judgment was obtained October 2, 1885, and execution

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thereon issued and delivered to appellee as constable on October 9, 1885, in favor of a third party and against Hendrix.

This execution was levied upon the corn in question November 28, 1885; whereupon appellant brought replevin against the officer, and the sole question is, was the transfer of the corn from Hendrix to appellant sufficient to defeat the claims of the execution.

The sale was complete on the 22d of September, and the title to the growing corn passed out of Hendrix to appellant then. The parties intended the sale to be complete before the corn was measured; appellant made to Hendrix a distinct offer as to price, the manner of payment, and the means by which the quantity of corn could be ascertained when gathered and cribbed, and Hendrix replied: "It is a trade; it is your corn."

It seems to us nothing could show more clearly that the parties intended that the sale should be complete at that time and before the corn should be measured, and if so, the title would at once pass. *Graff v. Fitch*, 58 Ill. 373; *Shelton v. Franklin*, 68 Ill. 333; *Straus v. Minzesheimer*, 78 Ill. 492.

And this being a sale of standing crops, the possession is in the vendee until it is time to harvest them, and until then he is not required to take manual possession of them. *Ball v. Griswold*, 19 Ill. 631.

But the objection is made that when the corn was gathered, after its maturity, appellant lost his right by permitting it to remain in the apparent possession of Hendrix an unreasonable length of time. There would be great force in this position if the article purchased had been of such a nature as required an actual manual delivery, but as we understand the law, to constitute a delivery of so large a quantity of corn in cribs as that in controversy, or any cumbrous bulky article incapable of being handed over from one to another, there need not be manual delivery of them.

We think that the cribbing of the corn at the place agreed upon by Hendrix was a sufficient delivery to appellant. The title to the corn had been in appellant since the 22d of September, and we can see no good reason why he might not have

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the corn cribbed on the place where grown as well as elsewhere until such time as it suited his convenience to remove it.

Had the quantity been small, capable of being easily handled, the rule might be different. But if one buying a stack of hay, a raft of logs or a large pile of lumber, is not required to remove such things, but may leave them during his pleasure at the place where they were when purchased, we do not see why appellant, who had bought the corn in September and had it gathered and cribbed where he wanted it to remain, possibly through the winter, should be compelled to remove it from such place to protect his title, any more than if he had upon the 28th of November bought it for the first time, and regarded the understanding of himself and Hendrix, that the cribs were then and there delivered, as a delivery which in the latter case would clearly be good. *Jewett v. Warren*, 12 Mass. 300; *Cartwright v. Phoenix*, 7 Cal. 281; *Chaplin v. Rodgers*, 1 East, 192; *Hart v. Wing*, 44 Ill. 141; *Ticknor v. McClelland*, 84 Ill. 471; *May v. Tallman*, 20 Ill. 443.

We think appellant was entitled to recover, and the court below erred in finding to the contrary.

It was also error to permit appellee to testify that he was acting as constable. He was the defendant in the replevin proceedings; had taken the property by virtue of an execution; therefore the direct question was raised as to whether he was a constable or not, and it was therefore incumbent on him to prove that he was a constable *de jure*. *Outhouse v. Allen*, 72 Ill. 529.

For the errors indicated the judgment of the court below will be reversed and the cause remanded.

Reversed and remanded.

People of the State of Illinois v. Blackwelder.

PEOPLE OF THE STATE OF ILLINOIS EX REL. H. H.
BEACH ET AL.,

V.

D. M. BLACKWELDER ET AL., HIGHWAY COMMIS-
SIONERS, ETC.

Construction of Statutes—Omission—Opening of Highways on Township Lines—Sec. 57, Ch. 121 R. S.—Omission of Words—“Either” Construed as Meaning “Each”—Mandamus.

1. Statutes must be interpreted according to their intent and meaning, and not always according to their letter. When the words are not precise, definite and clear, such construction will be adopted as shall appear most reasonable and best suited to accomplish the general object of the statute. Where any particular construction would lead to an absurd consequence, it will be presumed that some qualification or exception was intended.

2. Sec. 57, Ch. 121, R. S., attempting to provide for the opening of roads, “on township or county lines, or from one township into another,” is defective in that the words “or township” were inadvertently omitted after the word “county” in the provision requiring the petition to be “signed by not less than twelve land owners residing in either county within three miles of the road.” In the construction of said section this court supplies the omitted words, and holds that “either” must be read to mean “each.”

3. Upon demurrer to a petition for a writ of *mandamus* to compel the Commissioners of Highways of the towns of North and South Litchfield to allot to each of said towns a part of a road along the line dividing the towns, for its maintenance, and to apportion the expense of locating the same, it is *held*: That the road in question was not located according to law, the requisite number of land owners of each township not having signed the original petition.

[Opinion filed August 26, 1886.]

APPEAL from the Circuit Court of Montgomery County;
the Hon. JESSE J. PHILLIPS, Judge, presiding.

Mr. WILLIAM ABBOT, for appellant.

Mr. J. M. TRUITT, for appellees.

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WALL, J. This was *mandamus*, to compel the Commissioners of Highways of the Township of North Litchfield and South Litchfield, in the County of Montgomery, to allot to each of said towns the part of a road along the line dividing the towns, to be kept open and in repair, and to apportion the expense of locating the road pursuant to Sec. 58, Ch. 121, R. S.

The Circuit Court sustained a demurrer to the petition for *mandamus*, and the only question is as to this ruling. The point is made that the road was not located according to law. It will be noticed this road runs from east to west along the line dividing the two townships, and the objection is that the requisite number of land owners of each township did not sign the original petitions to the respective Boards of Highway Commissioners praying for the location of the road. By Section 31, Ch. 121, it is provided that the Commissioners of Highways may lay out a new road upon the petition of land owners, not less than twelve, or two thirds of those residing in such town within two miles of the road so to be laid out. Section 32 prescribes what the petition shall contain, and by subsequent sections the proceedings of the Commissioners are stated and regulated.

This Section 31 sufficiently provides the mode necessary to initiate the opening of a road wholly within one township.

By Section 57 an effort is made to provide for a road on a township or county line, or from one township into another. That section reads as follows:

“Public roads may be established, altered, widened or vacated *on township or county lines, or from one township into another, in the same manner as other public roads*, except that in such case a copy of the petition shall be posted up in and presented to the Commissioners of each town interested; *said petition to be as in other cases, and signed by not less than twelve land owners residing in either county, within three miles of the road* so to be altered, widened, located or laid out; whereupon it shall be the duty of the Commissioners of the several towns to meet and act as one body in the same time and manner as in other cases, in considering the petition, viewing the premises, adjusting damages and making all orders in

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reference to such proposed road, alteration, widening or vacation, and a majority of all such Commissioners must concur in all such orders; and a copy of all final orders and plats and papers shall be filed and recorded in each of the counties and towns interested."

The difficulty arises upon the construction of this section. It is evident that there is an omission, or that there is, by inadvertence, an insertion of words not intended. The section undertakes to provide for a road on a township or county line, or from one township to another, and declares they shall be established in the same manner as other public roads, except that a copy of the petition shall be posted up in and presented to the Commissioners of each town interested—the petition to be as in other cases, and signed by not less than twelve land owners residing in either county, within three miles of the road. This clause, "signed by not less than twelve land owners residing in either county, within three miles of the road," by its position in the sentence, qualifies what precedes, and literally considered applies as well to a road on a township line, or from one township into another, as to a road on a county line. This, however, leads to an absurd consequence, and is manifestly not what was intended by the Legislature.

Reading sections 31 and 57 together, as we must, we think it clear that the true spirit and intent of the statute is that in all cases the Highway Commissioners shall be petitioned by the land owners of their respective townships, not less than twelve within three miles, when townships only are affected, and the same number when county lines are involved, and that by inadvertence the words "or township" after the word county and before the word "within" were omitted in drafting the section.

Another construction suggested by counsel is that the words "when the road is on a county line the petition shall be" were omitted and should be supplied. In adopting this construction it becomes necessary to add so many words that it is somewhat difficult to suppose their omission was unnoticed, whereas it is nothing unusual to find one or two words have accidentally been dropped. We are inclined to think the omission of

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the words "or township" was inadvertent, and that they should be supplied, and that the word "either" must be read to mean "each," which is its not infrequent use.

The manifest policy of the law is that the local authorities of each township shall have control of and be held responsible for the system of highways within the township, and that a petition of the land owners within certain bounds is essential to give jurisdiction to the proceedings of the Commissioners.

It is not to be supposed that this policy is abandoned when the road is on a town or county line, or runs from one town to another. All the reasons for such a policy are operative and obvious in these cases as much as when the road is wholly within one town, and in construing the section we are justified in the assumption that such was the theory of the law. Upon the subject of construction in such and analogous cases, see *Perry County v. Jefferson County*, 94 Ill. 214; *The People v. Hoffman*, 97 Ill. 234.

Statutes must be interpreted according to their intent and meaning and not always according to the letter, and when the words are not precise, definite and clear, such construction will be adopted as shall appear most reasonable and best suited to accomplish the general object of the statute; and when any particular construction would lead to an absurd consequence, it will be presumed that some qualification or exception was intended by the Legislature to avoid such conclusion.

In the present case the petition to the Highway Commissioners was signed by more than twelve land owners residing in North Litchfield within two miles of the proposed road, and by some, but by less than twelve, and less than two thirds; of the land owners of South Litchfield within the two miles.

According to the construction above indicated, which we are disposed to accept, or the other suggested—one of which we think must be adopted—the necessary petitions were not presented to the Highway Commissioners to give them jurisdiction to lay out the road, and the demurrer to the petition for mandamus was well taken. The judgment of the Circuit Court will therefore be affirmed.

Affirmed.

Mass. Mutual Life Ins. Co. v. Hayes.

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY
V.
ELLIS W. HAYES AND DANIEL D. HAYES.

Life Insurance—Use of Intoxicating Liquors—Surrender of Policy—Action to Recover Balance—Charge of Fraud, not Sustained by the Evidence—Representations of Agent—Finding of Facts by the Court.

1. In an action to recover a balance claimed to be due on a policy of life insurance, the surrender of which is alleged to have been fraudulently procured by the agent of the defendant, it is held, upon a review of the evidence, that the charge of fraud is not sustained and is not true in fact.

2. Where the parties to a settlement sustain to each other no relation of trust or confidence, the settlement can not be impeached as fraudulent because of a false affirmation by one of them of mere matter of opinion, or even of fact, which is at least equally open to the knowledge or inquiry of the other.

[Opinion filed August 26, 1886.]

APPEAL from the Circuit Court of Coles County; the Hon. C. B. SMITH, Judge, presiding.

Messrs. JAMES A. CONNOLLY and F. K. DUNN, for appellant.

A party who seeks to relieve himself from the obligation of his contract on the ground of fraudulent misrepresentation, must establish by clear proof that there has been a knowing misrepresentation of a matter material to his interests, which has misled him to his hurt. A false affirmation of mere matter of opinion, or even of fact equally open to the knowledge or inquiry of both parties, in regard to which neither could be presumed to trust the other, is not available for such purpose. 1 Story, Eq. Jur., Secs. 191, 197–201.

“The misrepresentation must not only be in something material, but it must be in something in regard to which the one party places a known trust and confidence in the other. It must not be a mere matter of opinion equally open to both parties for examination and inquiry, where neither party is presumed to trust to the other, but to rely on his own judg-

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ment. Matters of opinion between parties dealing upon equal terms, though falsely stated, are not relieved against." *Tuck v. Downing*, 76 Ill. 71; *Fulton v. Hood*, 34 Pa. St. 365, 371; *Foley v. Cowgill*, 5 Blackf. 18.

A wilful misrepresentation as to the price paid for land, or its value, or the probability of a sale, does not make a case of fraud, so as to enable the party deceived to recover back the excess of price paid by him under the influence of such statement. *Banta v. Palmer*, 47 Ill. 99; *Merryman v. David*, 31 Ill. 404; *Fish v. Cleland*, 33 Ill. 238; *Cleland v. Fish*, 43 Ill. 282.

"Yet, though the misrepresentation be even wilfully false, in order to found a right in the party to whom it is made, to avoid it, it should be of such a nature that he had a clear right to rely upon it as an actual and undisputed fact. * * * Every misrepresentation of a material fact is fraudulent in law if the party to whom it was made did not have equal means of knowing or ascertaining its falsity, or if it be made in such a manner as to induce him to forbear making any inquiries in regard to it." *Story on Contracts*, Sec. 510.

"A man who knows or has the means of knowing his rights, must, under ordinary circumstances, be expected to stand upon them. *Mayhew v. Phoenix Ins. Co.*, 23 Mich. 105; *Ætna Ins. Co. v. Reed*, 33 Ohio St. 283.

"In an action for deceit no recovery can be had unless the plaintiff himself exercised ordinary prudence to guard against the deception and fraud practiced upon him, unless he has been thrown off his guard by the other party." *Schwabacker v. Riddle*, 99 Ill. 343.

The representations made by Pendergast, in the interview with Hughes, were not such as the latter was in law authorized to rely upon as actual and undisputed facts, and thereupon forego all inquiry upon the subject. They were not really representations of facts at all, but only of Pendergast's investigation and its results.

Mr. Hughes had at least equal means with Pendergast of ascertaining the truth or falsity of the latter's information. No attempt was made to induce him to forbear making in-

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quiry in regard to it. He was not "thrown off his guard by the other party." In fact, it was not until after the interview was over, and the hopes of a settlement abandoned by both parties, and after consultation with his friends in Mattoon, that he came to Pendergast with a wholly new proposition of his own, which was accepted. Even then he was unwilling to proceed until he had consulted Mrs. Hayes, the plaintiff in this suit, the mother of his wards, whose interests were involved, in whose family Job Hayes had lived for many years. Their means of knowledge in regard to Job Hayes' habits were far greater than Pendergast's. Hughes lived in Mattoon, where Job Hayes had lived for several years. He knew Hayes' family, friends and associates in Mattoon, and knew that many of his relatives and associates remained at Lawrenceburg, from whom all the information he might desire as to his habits could be obtained.

Pendergast's representations, at most, amount to no more than the expression of an opinion. "Matters of opinion between parties dealing upon equal terms, though falsely stated, are not relieved against." Story, Eq. Jur., Sec. 197; Tuck v. Downing, 76 Ill. 71; Fulton v. Hood, 34 Pa. St. 365; Foley v. Cowgill, 5 Blackf. 18.

"To render a representation fraudulent, it must be false, and not only so, but the party making it must know that it is false. To recover in an action for deceit, the statement must be untrue; the party making it must know it is false, and the party seeking to recover must have relied upon the statement as true, and have been induced to act upon the statement; and the statement, to authorize a recovery, must have been in relation to a matter material to the transaction." Merwin v. Arbuckle, 81 Ill. 501; Tone v. Wilson, 81 Ill. 529; St. L. & S. E. R. R. Co. v. Rice, 85 Ill. 406; Wheeler v. Randall, 48 Ill. 182; Richards v. Betzer, 53 Ill. 466.

"A knowledge of the falsity of the representations must rest with the party making it, and he must use some means to deceive or circumvent. St. L. & S. E. R. R. Co. v. Rice, 85 Ill. 406; Walker v. Hough, 59 Ill. 375; Sims v. Klein, Breese, 233; Dunbar v. Bonesteel, 3 Scam. 32; Fountleroy v. Wilcox, 80 Ill. 477.

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Messrs. CRAIG & CRAIG, for appellees.

A compromise procured through the artfulness of another party will not be upheld. *Knotts v. Preble*, 50 Ill. 226; *Headley v. Hackley*, 50 Mich. 43.

Fraud may be proved by circumstances. *Bullock v. Marrott*, 49 Ill. 62; *Bowden v. Bowden*, 75 Ill. 143.

“It is the duty of every party, in making a contract, to be honest and truthful in his statements and representations, and although a party to a contract is bound to exercise reasonable care and caution to prevent being defrauded, yet if the party committing the fraud make use of such false statements, representations and acts, with respect to a material inducement to the contract, as are calculated to deceive and mislead a person acting with common prudence and without indiscretion, and he is thereby induced to enter into a contract, or to part with his property, then such party can not be heard to complain that the person so deceived and misled did not make such inquiries as might have resulted in a discovery of the falsity of the representations.” *Eames v. Morgan*, 37 Ill. 263.

“If a party makes a representation, not knowing whether it was true or false, he can not be considered innocent, since a positive assertion of fact is by plain implication an assertion of knowledge concerning it. Hence, if the party has no knowledge about it he has asserted for truth what he knows to be false.” *Bigelow on Fraud*, 61 1st Met. 193, 201; *Bennett v. Judson*, 21 N. Y. 238; *Stone v. Covell*, 29 Mich. 363.

“It is not essential, however, that the representation should form the sole inducement to a contract; it is enough that they form a material inducement.” *Cooley on Torts*, 502.

CONGER J. This case, after passing through various amendments and having been once in this court (16 Ill. App. 233), was finally tried upon a declaration wherein appellees, by their next friend, allege that appellant, on the 16th day of February, 1874, insured the life of one Job Hayes for their benefit, in the sum of \$12,000; that Job Hayes died August 19, 1876; that James F. Hughes was the guardian of appellees, and as such had

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charge and control of the policy; that appellant, through its agents and servants, in order to cheat and defraud appellees, and to obtain fraudulent settlement and the possession of said policy, on April 20, 1877, falsely, fraudulently and covinously and with intent to cheat and defraud appellees, represented to Hughes, the guardian, that said Job Hayes had been, before the policy was issued, a person who used intoxicating liquors daily and habitually; that said statements were false, and defendant when making them knew them to be false; that the guardian relied upon such statements, and said defendant obtained by said fraud from said guardian the agreement to accept \$6,045, in settlement of said policy and its surrender to appellant.

Pleas were filed, trial had, and a verdict for \$9,060 rendered in favor of appellees, and judgment being entered thereon appellant brings the record to this court.

The foundation of this action being the alleged fraudulent and false statements of one Pendergast, who was the agent of appellant in making the settlement with Hughes, the guardian, and Pendergast and Hughes being the only witnesses upon this point, it will only be necessary to notice their testimony.

Hughes says that the first thing he did toward collecting the policy was to send to the company an overdue premium. He then forwarded the proofs of death, and in March, 1877, Pendergast, the agent of appellant, visited Mr. Hughes in reference to the matter, but nothing was done, and Pendergast left without making any propositions of settlement. On the 16th of March suit was instituted upon the policy, but the summons remained in the possession of Hughes until Pendergast returned. April 20th Pendergast returned, and their interview and settlement is fully shown by Mr. Hughes' testimony, which we quote in full from the abstract.

"Mr. Pendergast came there on April the 20th, something over a month after this summons was issued. He came to see further about the business, and reported to me that during his absence he had been down to Lawrenceburg, Indiana, where Job Hayes had formerly lived, investigating the correctness of his answers on his application, and told me that he

had there found that his answers to two of those questions, regarding the use of intoxicating liquors, were false, and that he had found the proof there to show that they were false, and we discussed that. He also said that he was desirous of settling the matter, and was willing to pay an amount equal to what it would cost to defend a suit on the policy. I asked him what amount that was, and he mentioned the sum of probably \$2,500 to \$3,000, and that he would just as soon pay it as pay it out in expenses in defending a suit; that he would not feel like paying any more than that. I told him I could not accept that, and he intimated then that he had some other defense to it. I asked him what it was. I asked him if it was something about his grandmother, and he laughingly replied that it was. That part was passed between us in a jocular manner, neither of us attaching any importance to it—at least I did not, and after a general friendly conversation between us about the matter, we went out of the office. This took place in my office. I don't remember of going out together, but perhaps we did; we both went out anyway. I opened the drawer, and took out the summons which I had in reserve for him, but not while Pendergast was in there. If I went out with him I afterward went back and got it. Mr. Pendergast did not know I had the summons. I did not let him know it. I wanted to settle with him, and if I did settle that was the end, and if he did not settle I did not want him to leave town until I got service on him. He went away. I was not disposed to accept the offer, and he was not disposed to offer more, and I got my summons and hunted up a deputy sheriff and handed it to him, and while I can not recollect pointing out Mr. Pendergast, the probability is I did. Mr. House served the summons on him. After he had been served I went into the barber shop where he was. I don't remember how I knew he was there, or whether I saw him go in; I only know I went in there and saw him sitting in a chair. There was no conversation that I recollect of between myself and Mr. Pendergast or anybody else representing this company, between the time he left my office and the time of serving the summons on him, nor between the

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time he left my office and the time I met him in the barber shop. I went in and asked him if he had received the summons and he said he had. I told him I had been thinking about the matter since we had our talk in the office, and that I had made up my mind to make him an offer or proposition—he had made me one I had not accepted, and I thought I would make him one, and I proposed if he would pay fifty cents on the dollar on the amount due on the policy, that I would take it, provided the mother, Mrs. Hayes, would consent to it. I can not say I have a memory of having told him of having consulted other parties. I did consult with two or three other men in whom I had confidence as to whether or not I had better make such a proposition as that, and detailing to them what information I had derived from Mr. Pendergast about the case, and after consulting with them I concluded to go and make the offer. I have no memory as to whether I told Mr. Pendergast I had so consulted them. If he remembers I did so I have no doubt it is true. I approached him and made this proposition while he was sitting in the barber's chair, and it was made dependent on my having an opportunity of consulting Mrs. Hayes. I told him she was in Shelby County at some distance—in the town of Shelbyville—and I could go to Shelbyville on the noon train; go to see her and get back by 11 o'clock at night, in time to see him, and in case we settled it he could go on to Chicago at 12 or 12:30 o'clock, and that arrangement was made between us. He agreed to wait while I went to Shelbyville and saw her. I went out and got a team at Shelbyville, and drove out three or four miles in the country, and found Mrs. Hayes where she was visiting, and I had a talk with her about the matter. I told her of Mr. Pendergast being in Mattoon, and what proposition I had made to him, and that he had agreed to accept it in case I got her to accept of it, and I asked her what she thought I had better do about it, and her reply to me was to do as I thought best. I told her I thought it was best to make that settlement. I then came back to see Mr. Pendergast. He made out and gave me two drafts of equal amounts, \$3,022.50 each, making \$6,045, which was fifty per cent. of the amount then due, principal

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and interest. I gave him up the policy, and signed this receipt he had already prepared. He had the drafts and receipt prepared, and I signed the receipt and gave him the policy. He was expecting to go north on the midnight train on the Illinois Central, and probably had only about an hour after I would get back, and had these papers prepared to save time. These drafts were paid. I got the money, made a report of it to the court, and paid it out under direction of the court for the use of these children. The suit which I commenced against the company, and had the summons served, I had dismissed at the next term of court. I think these papers shown me are all the files of that case. There was a precipe and summons, and then the suit dismissed without any further paper being filed; there was no declaration. I have no recollection when I made known to Mrs. Hayes that I had completed the arrangement or of her saying anything about it. I saw her frequently. She knew, of course, in some reasonable time, that I had completed the settlement, I don't know just when."

Mr. Pendergast's statement of the settlement is substantially the same, except he gives more in detail what he had learned at Lawrenceburg as to Job Hayes' habits in reference to the use of intoxicating liquors.

The other evidence tends to show that Pendergast was told by parties in Lawrenceburg certain things in reference to Hayes' habit that might lead one inquirer to the conclusion that Hayes had been in the habit of using intoxicating liquors to excess, and another to a different conclusion.

Altogether it may be conceded when all the evidence taken in this case is considered it is reasonably clear that such charge against Hayes was not true. But the question is not what were his habits as developed upon a full investigation, but did Pendergast have such information at the time he visited Lawrenceburg as would enable him to form an honest opinion that Hayes had been in the habit of using intoxicating liquor to excess. We think he did. Again, Pendergast's statements, even as given by Hughes, can not be regarded as statements of facts peculiarly within his own knowledge, and upon which Hughes could rely without making an investigation.

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Hughes says Pendergast's statement was "that he had found that Hayes' answers to two of the questions regarding the use of intoxicating liquors were false, and that he had found the proof to show that they were false." What character and quality of proof would have sustained this charge was and must necessarily be a mere matter of opinion; rumors and loose declarations, not legal evidence at all, might lead a man unlearned in the law to suppose he had found proof of some disputed fact, while the same things presented to the mind of a lawyer would enable him to say at once that there was no value to them as evidence.

The parties were standing at arm's length. No relation of trust or confidence existed between them; Hughes had known for some time that the company was disputing the claim. The means of investigating the habits of Hayes at Lawrenceburg were equally open to both, and, in fact, more favorable to Hughes than the company, for the reason that Maggie Hayes, the mother of appellees, was a sister-in-law of the deceased and had relations at Lawrenceburg.

It was the duty of the guardian, if he thought the statements of Pendergast at all material as to the liability of the company, to investigate for himself, and not trust to the opinion of the agent of the company, "that proof had been found sufficient to show that Hayes had been in the habit of using intoxicating liquors to excess."

Perhaps there is no one subject investigated in courts of justice so difficult to define and establish by evidence as the charge that a man is in the habit of using intoxicating liquors to excess. The views of men upon the subject are so diverse, and are so moulded by education and prejudice, that no uniform standard of judgment upon the subject is possible.

Again, the proposition made to Hughes by Pendergast at the time of this statement was neglected and negotiations broken off. After the summons was served upon Pendergast, Hughes upon his own motion made another proposition, upon condition that the mother of appellees should approve it, which was accepted; the mother did approve, and it was completed.

Druly v. Estate of W. F. Johnson.

We see nothing in the case to justify the charge in the declaration that the settlement was procured by fraud.

It is said Hughes had no authority to make the settlement. We express no opinion upon that question, as that can only arise when the policy itself is sought to be enforced. Whether he had the power to settle or not does not arise in this case.

We see no legal grounds for a recovery in this case, and the judgment of the Circuit Court will therefore be reversed.

Reversed.

Finding of facts by the court, to be incorporated in the final judgment by the clerk:

The court finds that the policy of insurance for \$12,000, issued on the 16th day of February, 1874, upon the life of Job Hayes, for the benefit of Ellis W. Hayes and Daniel D. Hayes, was, on the 20th day of April, 1877, by James F. Hughes, guardian of said Ellis W. and Daniel D. Hayes, surrendered to the agent of the said insurance company for the consideration of \$6,045, then paid to said guardian by the agent of said insurance company.

The court further find that the charge in the declaration that the surrender of said policy was procured by fraud upon the part of said insurance company, or its agent or agents, is not supported by the evidence and is not true in fact.

JESSE DRULY

V.

ESTATE OF WILLIAM F. JOHNSON, DECEASED.

Adjudication of Claim against Estate—Note—Whether an Individual or Partnership Liability—Practice—Instructions—Degree of Accuracy Required.

1. Where the evidence is so complicated as to render the proper determination of the issue doubtful, great accuracy in the instructions is required.

2. In the case presented, in which the question involved is whether a claim against an estate, based on a note given by the deceased, is an indi-

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vidual or partnership debt, it is *held*: That the production of the note made a *prima facie* case of individual indebtedness; that an instruction to the effect that the plaintiff "must go further," and show by a preponderance of evidence that the money was loaned to the deceased individually, was misleading, and should have been refused; that an instruction given as to the interest of certain witnesses as heirs of the deceased, though correct as a proposition of law, was erroneous, as containing an argument which was in itself unsound; that an alleged error, which manifestly did the appellant no harm, is immaterial, and that an objection to the answer of the partner of the deceased to a question as to whether he signed the note as surety, was improperly sustained.

[Opinion filed August 26, 1886.]

APPEAL from the Circuit Court of McLean County; the Hon. O. T. REEVES, Judge, presiding.

Messrs. STEVENSON & EWING, for appellant.

Messrs. JOHN J. MORRISSEY and BENJAMIN D. LUCAS, for appellees.

WALL, J. The appellant, Jesse Druly, presented a claim amounting to nearly \$8,000 for allowance against the estate of Wm. F. Johnson, deceased.

The chief question in the case was whether the claim should be allowed as the individual debt of Johnson, or as the partnership debt of Johnson & Druly, a firm composed of said Wm. F. Johnson and Wm. M. Druly, a son of the claimant. Johnson wished to raise \$6,000, and to accommodate him the claimant, who was his father-in-law, gave a mortgage on his own land for that sum, and the money was paid over to Johnson, for which the latter gave his note to the claimant. This note is signed by Wm. F. Johnson and Wm. M. Druly.

The firm of Johnson & Druly were engaged in business at Joliet, and the money was put into the firm business by Johnson. The case was tried by jury, and there was a verdict for claimant for \$7,730, and that the debt was the partnership debt of Johnson & Druly.

We are very strongly inclined to the opinion that this ver-

dict is against the weight of the evidence so far as it finds the character of the debt to be partnership and not individual, and to say the least the evidence was such as to call for great accuracy in the instructions.

The court gave the following instruction at the instance of the estate. "The court instructs the jury, that although the jury may believe, from the evidence, that plaintiff got \$6,000, and afterward loaned it to either the deceased, Mr. Johnson, or Johnson & Druly, yet that of itself does not make out a case for the plaintiff; but the plaintiff must go further and show by a preponderance of the evidence that the money was loaned to the deceased, Mr. Johnson, individually."

Of course the burden of proof was on the claimant; and to the mind of a lawyer the proposition involved here might be clear enough, but as applied to the evidence it might easily mislead the jury.

The production of the note made a *prima facie* case of individual indebtedness, and while the evidence offered by the defense might tend to show it was a partnership debt, and therefore it might be literally true that the money was loaned either to Johnson or to Johnson & Druly, yet it was for the jury to say how this was, and it does not follow that there was such ambiguity or lack of proof as to require the plaintiff to "go further." The jury would be left to infer that if by the proof it was shown the money was loaned to the individual or the firm, then there must be some additional proof that it was loaned to the individual; whereas it might well be said, and we think such is the state of the evidence, that while there was more or less doubt, yet upon the whole the preponderance was with the plaintiff. The instruction was calculated to confuse and mislead the jury, and should have been refused.

The following instruction was given at the instance of the estate.

"The court instructs the jury, for the defendant, that witnesses John O. Johnson and Joseph McNaught, under the law, can receive no part or share of the estate of the property of William F. Johnson, deceased, as heirs of said deceased,

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until all the debts of said William F. Johnson, both individually and partnership, are paid up."

The object was no doubt to produce a favorable impression of the witnesses referred to or to contradict anything unfavorable, produced by the argument of counsel.

The legal proposition here stated being admitted as correct, yet the inference likely to be drawn by the jury, that these witnesses had no interest in the result, would be erroneous so far as John O. Johnson was concerned. He was a son of the deceased, and had a direct interest in showing that this was a partnership debt. The instruction was nothing if not an argument, and as an argument it was unsound.

Complaint is made of the action of the court in giving the sixth instruction asked by the estate with regard to the mutilation of the note. There is but little if any evidence on which to base it, yet as the jury found the issues for plaintiff as to the point involved, it manifestly did no harm.

It is also insisted there was error in not permitting Wm. M. Druly to testify that he signed the note as surety. The record shows the witness testified that he did so sign the note, and that an objection to this answer was made, and by the court sustained. It is argued by counsel that the whole transaction had been detailed by the witness, and therefore this question but called for his opinion upon the legal effect of it, and that the court did not as a matter of fact exclude it from the jury. When the court sustained the objection it was equivalent to saying that the answer was incompetent, and should not be considered by the jury. While it is true the witness had given in detail what occurred in the transaction, yet we see no reason why he should not be allowed to say categorically in what capacity, whether as principal or surety, he signed the note.

It is to some extent a legal question whether one is a principal or surety, or rather what is the definition of those terms, yet it is in substance a mere question of fact whether in this case the witness was a party to the loan, or whether he signed the note as principal or surety.

We deem it an undue refinement of terms to exclude the

answer to such a question because it involves the expression of a legal opinion or conclusion of the witness.

This would perhaps not be such error as to warrant a reversal of the case, inasmuch as the witness gave quite fully his knowledge of the whole transaction. For the error in giving the instructions referred to, the judgment will be reversed and the cause remanded.

Reversed and remanded.

PEOPLE OF ILLINOIS EX REL. COMMISSIONERS OF HIGH-
WAYS
V.
BOARD OF SUPERVISORS.

Town Bridges—County Aid—Emergency Clause of Section 19, Act of June 23, 1883—Construction of—Evidence—Mutilated Public Records—Presumption that Public Officers Have Done Their Duty.

1. Upon a petition for a writ of *mandamus* to require a county to contribute half of the cost of a town bridge under the emergency clause of Section 19, Act of June 23, 1883, it is *held*: That an emergency which arose before and continued until after it went into effect is within the act; that this construction does not give the act a retroactive operation, and that the town is not required to show that it has provided half the funds necessary to build the bridge, it being the duty of the County Board, when such fact is not shown, to make its appropriation conditional.

2. In the absence of other suspicious circumstances, it is not a sufficient ground for the exclusion of a public record, when offered in evidence, that some of its leaves are missing.

[Opinion filed August 26, 1887.]

IN ERROR to the Circuit Court of Hancock County; the Hon. J. H. WILLIAMS, Judge, presiding.

Messrs. BENSON & PETERSON, MANIER & MILLER and HOOKER & EDMUNDS, for plaintiff in error.

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MESSRS. FRANK HALBOWER, States Attorney, W. E. MASON and O'HARBA & SCOFIELD, for defendant in error.

CONGER, J. This was a proceeding by *mandamus* to require the County of Hancock to contribute one-half of the cost of a bridge over Crooked Creek, in the town of St. Mary's, in said county. Trial was had at the June term, 1885, of the Hancock Circuit Court, and judgment rendered for appellees for costs.

Numerous errors are assigned upon the record, but we shall only notice those necessary to a determination of the rights of the parties.

On July 10, 1883, at the July meeting of the Board of Supervisors, the Highway Commissioners of St. Mary's presented a petition to the Board, representing that during the high water in February, 1883, the bridge across Crooked Creek in said town, on the public highway, etc., was washed away and wholly destroyed; that such highway had been used and worked for more than twenty years, and was the most important one in the township; that Crooked Creek was a large and important stream, being about 110 feet wide where this highway crossed it; that there was no other wagon bridge across said stream for a distance of about nine miles above and six miles below; that such bridge had been largely used by the inhabitants of said town, and other portions of Hancock County, in carrying their produce to market.

The petition represents that the immediate construction of a bridge being necessary, and that a delay in building it would be detrimental to the public interests, they had proper plans made, advertised for bids, and that upon due and proper notice, and upon competition, the lowest bid received to construct the same was \$4,590, which was a fair and reasonable price, and that on the 22d day of June, 1883, they had let the contract at that price (not including the approaches, which were estimated to cost \$700), by which contract the bridge was to be completed by the 15th of September, 1883.

The petition then gives in detail the assessed value of the property of the township as returned by the assessor, the

amounts necessary to be expended for other highway purposes, etc., the inability of the town, the necessity for county aid, as required by Sec. 19 of the Road and Bridge Act of 1883, except that it states that the assessment had not at that time been equalized by the State Board, and that they had not as yet made the requisite levies, but that it would be their duty to do so at their meeting in the fall immediately preceding the meeting of the Board of Supervisors in September.

To this petition was attached the sworn statement of the Commissioners that they had made a careful estimate of the probable cost of such bridge and approaches thereto, "and that in their judgment the sum of \$4,590, at which the contract was let for the erection of the bridge, is a fair and reasonable cost for its construction, and that in their judgment and upon careful estimate the approaches thereto will cost about the sum of \$700; that the construction of said bridge and approaches is necessary and demanded by the public interest, and that said bridge and approaches will not be made more expensive than is needed for the purpose desired."

The petition also stated that the town, by borrowing money, had made provision for the payment of one-half the amount necessary to construct said bridge and approaches.

The County Board postponed final action upon this petition until its meeting in September, 1883, when, upon the 12th of that month, the Commissioners filed a supplemental petition, referring to and making the original petition a part of the one then filed, and representing, in addition, that on the 4th of September, 1883, being the time fixed by law, they met and made a levy of 60 cents for road and bridge purposes, and a further levy of 20 cents, as required by Section 15 of the Road and Bridge Act, etc., and that the major part of the 60 cents would be needed for ordinary repairs, etc.; whereupon the County Board took final action and refused the aid asked.

We think these two petitions, when considered together, make a good and sufficient petition under the emergency clause of Sec. 16 of the Road and Bridge Act, and were sufficient if true to require the County Board to grant the relief asked.

There had been other petitions filed before the present law

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took effect, which we do not notice, for the reason that in the view we take of the case they are immaterial.

It is contended by appellees that the emergency arose under the law of 1879, by the sudden destruction of the bridge, in February, 1883, and can not be regarded as coming within the emergency clause of the Act of 1883, unless some *new and changed* condition of affairs occurred after July 1, 1883.

We can not assent to this construction. The language of the provision is, "that in the case of some emergency arising from the sudden destruction or serious damage to a bridge or its approaches when delay in repairing or rebuilding would be detrimental to the public interest, such petition, etc., " may be presented, etc."

Webster defines the word emergency as "any event or occasional combination of circumstances which calls for immediate action or remedy; pressing necessity; exigency." If when the law of 1883 took effect there was a pressing necessity for immediate action, and delay would have been detrimental to the public interest, the same emergency which arose at the time the bridge was destroyed would still exist. The emergency would be a continuing one, calling for prompt action upon the part of the authorities from the time of the destruction of the bridge until it should be rebuilt.

The Supreme Court, in the case of the Board of Supervisors of Logan County v. The People, etc., 116 Ill. 446, uses the following language:

"It is said that as the old bridge was swept away while the law of 1879 was in force, and before the law of 1883 went into effect, the latter law can not be made to apply to an emergency which arose before its passage. The Act of 1883 went into force on July 1, 1883, and repealed the Act of 1879, "in regard to roads and bridges, etc.," which had been theretofore in force since July 1, 1879. If the objection made is a sound one, then in case a bridge had been suddenly destroyed one day before July 1, 1883, the Highway Commissioners could not proceed to build a new one in its place and apply to the County Board "during the progress of the work, or after its completion," for money enough to pay for half its cost, even though

a delay in commencing the construction of the bridge until the next meeting of the Board would be seriously detrimental to the public interests. Such a result would not have been intended by the Legislature. It makes no difference that the old bridge was destroyed before the new law went into effect.

The water in the creek continued so high that work could not be begun on the new bridge until after July 1, 1883. The same emergency, therefore, which arose before that date, continued to operate as a spur to prompt action after that date. The material fact was that delay in rebuilding would be detrimental to the public interest.

When such detriment to public interest was threatened, it was the duty of the Commissioners to let the contract at once; it was not material whether the emergency, which made it so injurious to indulge in delay, occurred before or after the passage of the new law.

It is true that a retrospective effect will not be given to a statute unless it clearly appears that such was the intention of the Legislature. But this act of 1883 is not made to have a retroactive operation because a proceeding under it has grown out of an emergency that occurred before its passage. No accrued rights are affected. No existing liabilities are increased or diminished. The County Board was liable to pay half the cost of the bridge under the old law, and it is liable to the same extent and no more under the new law. The change made by the second provision of the 19th section was merely in the time of application for an appropriation.

Upon a given state of facts, such application could be made by the terms of that provision during or after the building of the bridge, whereas theretofore it could only be made before the work on the bridge was begun."

Upon the trial below the court excluded the record of the Town Clerk of St. Mary's for the reason that two leaves of the record book had been cut from the book. No evidence was offered tending to show whether the absent leaves had contained any part of the records of the town, or whether they were entirely blank when taken from the book.

The different town clerks were called, and all stated they knew nothing as to how or when it occurred.

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We think there was nothing in this fact alone authorizing the court to exclude the book from the consideration of the jury. The book was a public record, required by law to be kept by public officers and for the benefit of any one interested in the business transacted by the town, and it is to be presumed until the contrary appears that they have done their duty, and the right of the public to the use of such records can not be destroyed by the mere fact, unaccompanied by any other suspicious circumstance, that a portion of the original leaves of the book are gone.

The whole controversy, however, over the introduction of this book in evidence, including the voluminous arguments submitted upon the question, is in our opinion unnecessary, as it is not essential, under Sec. 19 of the Act of 1883, for the town to show that it has provided one half the funds necessary to build the bridge; but when the necessary facts as provided in Sec. 19 appear, the County Board shall make its appropriation on condition that the town asking aid shall furnish the other half of the required amount.

The town may aver and show the provision of the funds on its part, and in such case the appropriation by the county should be unconditional; but if such fact is not shown the duty of the County Board to make the appropriation is equally imperative, but is conditional, and can be made available by the town only when it complies with its duty to provide the other half of the means.

There are many other errors assigned and urged upon our attention, but we deem it unnecessary to notice them.

For the errors indicated, the judgment of the Circuit Court will be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

WILLIAM KENNEDY, ADMINISTRATOR, ET AL.

V.

WILLIAM WIKOFF ET AL.

21 277
41 488

Garnishment—Chap. 62 R. S.—Sec. 37 of Attachment Act, not Applicable to — Creditor Recovering under Garnishee Process not Required to Share Proceeds pro rata with Other Creditors.

1. Under Sec. 37 of the Attachment Act other creditors bringing ordinary actions against the same debtor and succeeding in the recovery of judgments at the same term as the attachment creditor, are entitled to share *pro rata* in the proceeds of the attached property. But if the attachment for any reason fails to hold the property, it will not avail either the attaching creditor or others who rely on the provisions of said section.

2. Sec. 37 of said act does not apply to garnishee proceedings under Chap. 62 R. S., and a creditor who recovers upon garnishee process under said chapter is not required to share the proceeds with other creditors.

[Opinion filed August 26, 1886.]

APPEAL from the Circuit Court of McLean County; the Hon. O. T. REEVES, Judge, presiding.

Statement of the case by CONGER, J. This is a controversy between two sets of the creditors of John R. Snyder, who was a banker, doing business in Chenoa, McLean County, Ill. On the 30th day of September, 1883, Snyder made a deed of trust of all his property, both real and personal, to John J. P. Odell. On the 4th of October, 1883, William Wikoff and Alfred R. Kidwell commenced suit in attachment against Snyder. A few days afterward William Linden, Luther C. Hayes and Christian Clouden each commenced a suit in attachment against Snyder. At the following November term each of the above named appellees recovered a judgment against John R. Snyder for his claim, but not on the attachment. At the same term of court the other of appellees recovered a judgment against Snyder by confession. At the same term of court each of the appellants recovered a judg-

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ment by confession against Snyder. Afterward during the same term (Snyder having pleaded to the attachment) a trial was had on the attachment in the Kidwell case and judgment rendered for the plaintiff; from which judgment Snyder prayed an appeal to this court. During the same term of court appellees filed in said case an intervening petition in which they claimed that, by reason of having obtained a judgment in the same term of court in which the judgment in attachment was rendered, they were entitled to share in the proceeds of all property attached and garnished. The court took that matter under advisement, and Snyder prosecuted his appeal from the judgment in attachment, and on hearing, this court, on error confessed, reversed the judgment.

An execution was issued on each of the several judgments in favor of appellees and returned "no property found."

On the return of such executions each of the appellees swore out a writ of garnishment, which writs were served on John J. P. Odell, and the Union National Bank, and various other parties, making twenty-one suits in garnishment. All these suits in garnishment were afterward, by agreement and consent of all parties, consolidated into this one case, and was entitled J. R. Snyder for the use, etc., vs. John W. Bryant, et al. Various answers were made by the garnishees to the interrogatories filed, some admitted and some denied indebtedness, and afterward the court, on motion of the plaintiffs, appointed receivers to take charge of the property.

On the 13th day of November, 1884, each of the plaintiffs in the said attachment suits released all property attached and dismissed as to all garnishees.

On September 17, 1885, the attachments in each and all of the attachment suits were dismissed.

The same persons were summoned as garnishees in the garnishee suits who had been garnished in the attachment suits, and for the purpose of reaching the same property.

By means of the garnishee proceedings quite a large amount of property was reached and made available for the purpose of being applied toward satisfying the judgments of appellees, but the amount obtained was not sufficient to satisfy

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them. In order to obtain what was reached it was necessary for appellants to secure to the Union National Bank, of Chicago, one of the garnishees, something over \$10,000, it holding it as collateral for a debt exceeding \$10,000.

After the recovery of the judgments before mentioned in favor of appellants, John R. Snyder removed to Oregon, and appellants each commenced an action of debt on his judgment that he had previously recovered by confession. Summons in each case was sent Mr. Snyder in Oregon, and he there acknowledged services on the summons, and that was the only service had on Snyder.

Afterward, and at the same term of court in which the attachments were dismissed, each of the appellants took judgment against Snyder. November 28, 1885, the court made an order of distribution of the proceeds of the property garnished, ordering it distributed among appellees till each of such judgments was satisfied except four judgments, including that of Kidwell.

On the hearing of that motion for an order of distribution, appellants contended that the order should be made distributed *pro rata* among appellants and appellees. The court refused to make such an order but ordered it distributed among appellees, and from that order this appeal is prosecuted.

Messrs. W. E. HUGHES and J. S. EWING, for appellants.

The entire matter of *pro rata* distribution of attached property is one strictly of statutory regulation, and when the Legislature has clearly declared its intention the courts have no power to depart from the plain language of the statute for the purpose of establishing, as they may suppose, a more equitable rule. *Rucker v. Fuller*, 11 Ill. 223; *Jones v. Jones*, 16 Ill. 117.

The judgment of the Circuit Court in its order of distribution was erroneous, and will have to be reversed for the reason that appellants are clearly within the classes of creditors for whom the law of Illinois preserves all the attached property, whether levied on or in the hands of a garnishee at the time the first attachment is sued out and served. *Reeve v. Smith*,

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113 Ill. 47; National Bank of America v. Indiana Banking Company, 114 Ill. 483.

The Legislature intended to do two things: 1st, to sequester not a part, but all the property of the debtor in an attachment suit which may be levied on or in the hands of garnishees from the moment the writ is served until final judgment passes one way or the other in one of the attachment suits; 2d, to shut out from any participation therein, every creditor who takes a judgment by confession or weakly dismisses his attachment suit.

Messrs. KERRICK, LUCAS & SPENCER, for appellees.

These suits were commenced under the Garnishment Act and not under the Attachment Act, and there is no provision in the Garnishment Act similar to that in Sec. 37 of the Attachment Act. It is well settled by all the authorities that the first suit in garnishment in which service is had on the garnishee, is prior in right to the subsequent garnishees. Wilder v. Weatherhead, 32 Vt. 765; Erskine v. Stoley, 12 Leigh, 406; Moore v. Holt, 10 Grat. 284; Talbot v. Harding, 10 Mo. 350; Johnson v. Griffin, 2 Cranch, 199; Arledge v. White, 1 Head, 241; Bergman v. Sells, 39 Ark. 97; Waples on Attachment and Garnishment, 488; Drake on Attachment, Sec. 455-456.

Appellants are not garnisheeing creditors of Snyder, but base their claims simply and solely on the fact that at the same term that the attachments were dismissed they each recovered a judgment in debt against Snyder.

"In garnishment cases as in case of a levy, attachments take precedence in the order of their service." Drake on Attachment, Sec. 455. This rule does not apply to attachments in this State because our statute has expressly otherwise provided. But we insist it is the rule in the absence of some statutory provision to the contrary, and there is none applicable to the Garnishment Act.

CONGER, J. The controversy in this case grows out of the proper construction to be given section 37 of the Attachment

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Act, which is as follows: "All judgments in attachments against the same defendant returnable at the same term, and all judgments in suits by summons, *capias*, or attachment against such defendant, recovered at that term or at the term when the judgment in the first attachment upon which judgment shall be recovered is rendered, shall share *pro rata* according to the amount of the several judgments, in the proceeds of the property attached, either in the hands of a garnishee or otherwise. *Provided*, when the property is attached while the defendant is removing the same, or after the same has been removed from the county, and the same is overtaken and returned, or while the same is secreted by the defendant or put out of his hands for the purpose of defrauding his creditors, the court may allow the creditor or creditors through whose diligence the same shall have been secured, a priority over other attachments or judgment creditors."

As we understand, the construction of this section insisted upon by appellants, is, that when one sues out an attachment, and a final decision of the case is reached by a judgment being recovered by, or against, such attaching creditor, that all other persons who recover judgments against such attachment debtor, in accordance with the provisions of Sec. 37, are entitled to share *pro rata* in the proceeds of the attached property. We can not assent to this view. We think the section is intended to apply when the attachment is made successful by the attaching creditor recovering a judgment against his debtor, and not when, as in this case, the attachment fails, and judgment goes against the attaching creditor for the costs of suit.

When an attachment issues it lays hold of and appropriates the debtor's property, keeping it in the custody of the law until such time as it may be needed to satisfy the creditors' demand.

By Sec. 37, other creditors bringing ordinary actions against the same debtor and succeeding in recovering judgments at the same term as the attachment creditor, may make the one attachment a foundation for claiming a share of the proceeds of the attached property. But if the attachment

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from any reason loses its vitality and is unable longer to hold the property, its usefulness is gone and it will no longer avail either to the attaching creditor or to others relying upon the provisions of Sec. 37.

Others of the appellees beside Kidwell having obtained judgments against Snyder, by confession, issued executions upon such judgments, which were afterward duly returned, "no property found." On the return of these executions the plaintiffs sued out under the provisions of chapter 62, entitled "Garnishment," writs of garnishment, and had such writs served upon various persons having effects of said Snyder in their hands, and appellants also insist, as we understand their position, that they are entitled to share in the property and effects thus reached by garnishment by virtue of said Sec. 37 of the Attachment Act.

We think this Sec. 37 has no application whatever where garnishee process is taken out under Chap. 62. . When proceeding under that chapter, each creditor gets what he can and is not required to share with other creditors, unless they have succeeded in garnishing the same person or property.

By Sec. 6 of the Attachment Act, provision is made not only for attaching the debtor's property but also for summoning other persons as garnishees, and it is property and effects thus seized or garnished by the attachment writ that is required by Sec. 37 to be, under certain circumstances, divided out among the creditors.

We think the court held properly in excluding appellants from participation in the property and effects reached by the garnishee process issued under and by virtue of chapter 62, and the judgment will therefore be affirmed.

Affirmed.

WILLIAM R. SEAGO AND ELIZABETH FOILES

v.

THE PEOPLE, USE OF LUELLA J. REDDISH.

Guardian's Report, though Approved, Impeachable for Fraud—Action against Guardian and Surety to Recover Balance—Order of Probate Court, not Conclusive—Witnesses—Surety—Competency of—Sec. 2, Ch. 51, R. S., and First Exception—Construction of.

1. The order of a Probate Court, finding the amount due from a guardian, though generally conclusive against the guardian and sureties, may be impeached for fraud.

2. Sec. 2, Ch. 51, R. S., and the first exception thereto, when construed together, do not exclude the evidence of the adverse party to a suit, brought by an "heir" to enforce a right not claimed by inheritance, as to facts occurring during the minority of the plaintiff.

3. In an action against a guardian and surety to recover a balance shown to be due by a report of the guardian, which had been duly approved by the Probate Court, it is *held*: That a former sworn report of the guardian, which shows a much less balance to be due, the ward being therein charged for board, is admissible in support of a plea charging fraud, and that the surety is a competent witness for all purposes, the suit not being brought by the plaintiff as an heir.

[Opinion filed August 26, 1886.]

APPEAL from the Circuit Court of Jersey County; the Hon. G. W. HERDMAN, Judge, presiding.

On the 23d of October, 1875, Elizabeth Reddish (now Foyles) was appointed by the Probate Court of Jersey County guardian of her five minor children, including Luella J. Reddish. She was required to give bond with two sureties in the penal sum of \$1,700. The bond was given, purporting to be executed by Nathan Campbell and W. R. Seago, the appellant.

On the 23d of August, 1878, she made a report showing that she had on hand as guardian of said wards the sum of \$492.30. Again, on the 12th of January, 1884, she made, swore to and filed her report showing the fund exhausted in

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the support of her children, except the sum of \$17. This report was filed, but no action was taken upon it. Again, on June 17, 1884, she made report, disclaiming any credits for the support of the wards, and charging herself with interest on the fund from August 20, 1878, to June 17, 1884, making a total due her wards of \$664.10. This report was approved by the County Court, and immediately thereafter, on July 21, 1884, suit was commenced on her bond by Luella J. Reddish to recover her share of the said \$664.10.

The guardian at the time of this last report was utterly insolvent. Defendant Seago filed several pleas, on which issue was joined.

1st. He denies the execution of the bond.

2d. That the report showing a balance due the wards was fraudulent and that there was nothing due them from their guardian.

3d. That the whole of the fund belonging to the wards had been expended by their guardian in their necessary support.

In the progress of the trial below, defendant, Elizabeth Foyles, was called to testify that Seago had promised to execute the bond as her surety, and among other witnesses, Benj. Durnham and wife were also called to testify concerning alleged admissions of Seago that he had executed the bond. Mr. Seago was then called and testified, denying such promise and admissions, and was asked whether he executed the bond. The court holding he was incompetent by reason of his interest, refused to allow him to testify upon that question.

In support of the plea of fraud as to the report of the guardian, appellant Seago offered in evidence the sworn report of the guardian, dated January 12, 1884, showing only a balance of \$17 in hand, the proof showing that Luella J. Reddish was present when it was made. The court holding that the sureties were concluded by the report of the guardian, refused to admit the report. Evidence was also offered by appellant Seago tending to show that the whole of the sum of \$492.30 was necessarily exhausted in the support of these five children, which the court refused to admit.

The trial resulted in a verdict and judgment against appellant for \$143.93, to reverse which this appeal is prosecuted.

Messrs. BROWN & KIRBY, for appellants.

The court below erred in refusing to permit the appellants to introduce pertinent evidence tending to show that the money of the ward had been necessarily expended in support of the ward, and that there was no fund in the hands of the guardian belonging to the ward at the time the suit was instituted.

When attacked for fraud, it may be shown that the guardian's report is not true, and especially so when the question was expressly raised by the pleading, and there was evidence tending to show that the beneficial plaintiff was a party to the alleged fraud. The approval of the report made it only *prima facie* evidence of its correctness, which was subject to be rebutted in a proper case by competent evidence. *Bond v. Lockwood*, 33 Ill. 212.

Upon proof of fraud in its procurement, the allowance of the account of the guardian would be of no avail to the parties claiming the benefit of it. *Lynch v. Rotan*, 39 Ill. 14; *Bruce v. Doolittle*, 81 Ill. 103; *Roth v. Roth*, 104 Ill. 35.

All cases holding that a report of a guardian is conclusive on his sureties, are subject to the exceptions, "unless, indeed, they could impeach it for fraud or collusion." *Ream v. Lynch*, 7 Ill. App. 161; *Freeman on Judgments*, Sec. 2501; *Mfg. Co. v. Worster*, 45 N.H. 110.

The limitation to the rule of conclusiveness of a judgment is that it may be shown that it was obtained by fraud or gross abuse of the process of the court or a flagrant departure from the ordinary course of judicial procedure. *Roth v. Roth*, 104 Ill. 35.

The court erred in refusing to allow the witness, W. R. Seago, to testify as to whether he signed the bond in suit.

To justify the exclusion, it must appear that the matter occurred during the life of the ancestor. *Mahoney v. Mahoney*, 65 Ill. 406.

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Messrs. HAMILTON & SLATEN, for appellee.

Where fraud is relied upon as a defense it must be specifically pleaded by the defendants, and the plea must set out particularly the facts constituting the fraud. *Slack v. McLagan*, 15 Ill. 242; *Jones v. Albee*, 70 Ill. 34; *Beatty v. Nickerson*, 73 Ill. 605; *Hopkins v. Woodward*, 75 Ill. 62; *Cole v. Joliet Opera House Co.*, 79 Ill. 96.

The intendments and presumptions are all in favor of the regularity, correctness and validity of all the proceedings of the County Court in the matter of the appointment and supervision of guardians until the contrary is shown, and it is not necessary that all the facts and circumstances which justify its action shall affirmatively appear upon the face of the proceedings. *Propst v. Meadows*, 13 Ill. 157; *Mitchell v. Mayo*, 16 Ill. 83; *People v. Gray*, 72 Ill. 343; *Housh v. People*, 66 Ill. 178.

The evidence here sought to be introduced to impeach the correctness of the report of June 17, 1884, and to show that the guardian had expended the funds of her wards in their necessary support, should have been introduced in the County Court at the time of the presentation of the guardian's report there, and if the surety was not satisfied with the action of that court his only remedy was by appeal to the Circuit Court under the statute. *Ralston v. Wood*, 15 Ill. 159; *Housh v. People*, 66 Ill. 178.

CONGER, J. We think the court erred in excluding from the jury the report made by Mrs. Foyles on the 12th of January, 1884. It tended to show that originally the mother intended to charge her daughter Luella for board at the rate of fifty cents per week, and if such was her intention and she actually furnished her daughter with such board, at reasonable prices, it would have been *pro tanto* a payment to her daughter of which the sureties upon her bond could avail themselves, notwithstanding the mother might afterward desire to be charged with it solely for the purpose of enabling her daughter to recover from the sureties.

There being a plea charging fraud in the settlement, claimed

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to be conclusive as to the guardian and sureties, all evidence tending to show such fraud was competent.

The order of the Probate Court finding the amount due from the guardian, while generally conclusive upon such guardian and the sureties, like everything else may be impeached for fraud. *Amimon v. People*, 11 Ill. 6; *Ralston v. Wood*, 15 Ill. 159. Under the same plea we think the evidence offered as to the financial condition of the family should have been admitted.

We think Seago, the surety, was a competent witness for all purposes and that he is not excluded either by the second section of chapter 51 or the first exception to said section. Appellee Reddish was in no sense suing as an *heir*. She was seeking to recover from her guardian and Seago the surety upon the guardian's bond, which was a contract entered into after her money and property had descended from her father and become vested in her as her own property. Whether the funds that passed into her guardian's hands came from her father by descent or was the gift of some living friend or relative, or the wages of her own labor, could not make the slightest change in her rights. Her claims upon the guardian and sureties and their obligations to her would be precisely the same in either case; so that in no sense can it be said she was suing as an *heir*.

But it is insisted that the first exception to Sec. 2, Chap. 51, prevents Seago from testifying to facts occurring before appellee attained her majority.

This exception must be construed in connection with the second section and it will be observed that it is not every guardian that can avail himself of the provisions of section two, for it is only where a guardian or trustee "*of any such heir*" sues or defends that the adverse party, or person directly interested, is prevented from testifying. To make this section available, the ward, whom the guardian represents, must be an *heir*, one seeking to enforce or recover some right claimed by inheritance from some deceased person. It follows, therefore, that the first exception means when the guardian of a ward who is an "*heir of any deceased person*," sues

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or is sued, as a party or interested person, may not testify to facts occurring before such ward attains majority.

Because of the refusal by the Circuit Court to permit this testimony to go to the jury, the judgment of the Circuit Court will be reversed and the cause remanded.

Reversed and remanded.

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C. C. HOWDYSHELL AND JAMES B. SPEER

V.

MARY H. GARY.

Landlord and Tenant—Distress—Construction of Statute—Proceedings against Original Tenant—Property of Assignee can not be Taken—Action of Trespass—Excessive Damages—Recoupment—Instructions.

1. In a proceeding against the original tenant the landlord can not distrain the goods of said tenant's assignee, although they formerly belonged to the tenant and are found on the demised premises.

2. In an action of trespass to recover damages for wrongfully taking and selling the plaintiff's goods under a distress warrant against his assignor, it is *held*: That under the evidence the verdict for \$1,500 damages is excessive; that it was error to instruct the jury that the selling price of the goods at the sale under the distress warrant could not be considered as evidence of the value of the property, and that the abandonment of the lease did not entitle the landlord to recover by way of recoupment the rent to accrue, the extent of his right to recover being limited to the damages sustained.

[Opinion filed August 30, 1886.]

APPEAL from the Circuit Court of Ford County; the Hon. O. T. REEVES, Judge, presiding.

Messrs. TIPTON & MOFFETT, for appellants.

Our statute has modified the common law so as to exempt property of a stranger and enlarged so as to allow seizure in distress of any of the property of the tenant in the county.

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But all modifications of common law are to be strictly construed, and under the construction placed upon such modification, the property that comes within the definition of "property of a stranger" must be that which is brought and placed on the premises by a stranger, and not that which is derived from the tenant and allowed to remain on the premises. If property is purchased of a tenant before the purchaser can deprive the landlord of his right of distress, as to the property so purchased, he must remove it from the premises before the landlord seizes it in distress. *O'Hara v. Jones*, 46 Ill. 288; *Hadden v. Knickerbocker*, 70 Ill. 677; *Eames v. Mayo*, 6 Ill. App. 334; *Hastings v. Belknap*, 1 Den. 190; *Herron v. Gill*, 112 Ill. 247.

While there is no lien on such property of the tenant for the rent, still there is the right to seize it as long as it remains on the premises.

As assignee, appellee stood simply in the place of J. S. Gary, Jr., her assignor—liable for all covenants in the lease, for all obligations in the lease contained—and the property therein was subject to same burdens in respect thereto by the appellant, Speer, as landlord, as it was if the bill of sale had never been made, as long as property remained on the premises. *Coles v. Marquan*, 2 Hill, 447; *Babcock v. Scoville*, 56 Ill. 461; *Webster v. Nichols*, 104 Ill. 160; *LeGier v. Green*, 61 Tex. 128; *O'Hara v. Jones*, 46 Ill. 288; *Patty v. Boyle*, 56 Miss. 491.

There was no sufficient delivery of the property in question by J. S. Gary, Jr., to Mary H. Gary, appellee, to pass title to her as against appellant. *Richardson v. Hardin*, 88 Ill. 124; *Lewis v. Swift*, 54 Ill. 436; *LeFever v. Mires*, 81 Ill. 456; *Burnell v. Robertson*, 5 Gilm. 282.

The evidence discloses no legal possession taken under the chattel mortgage. *Gaines v. Becker*, 7 Ill. App. 315.

Appellee, under the bill of sale which she claims, takes an assignment of the leasehold interest of assignor in the premises demised to him. As such assignee, she became liable for all rent that became due under said lease after she became

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such assignee. *Babcock v. Scoville*, 56 Ill. 461; *Webster v. Nichols*, 104 Ill. 160.

Messrs. COOK & MOFFETT, for appellee.

The statute limits the right of distress to the goods of the tenant. *Gray v. Rawson*, 11 Ill. 527; *Uhl v. Dighton*, 25 Ill. 154.

In none of the cases cited by appellants does it appear that property, other than crops, in the hands of a *bona fide* purchaser was held subject to the landlord's lien, and this without regard to the question of removal.

It is not necessary that "property that comes within the definition of 'property of a stranger' must be that which is brought and placed on the premises by a stranger." *Gilbert v. Moody*, 17 Wend. 354.

The sale was complete and title proved. *Ives v. Hulce*, 14 Ill. App. 389; *May v. Tallman*, 20 Ill. 443; *Hart v. Wing*, 44 Ill. 141.

At common law landlord can only distrain for rent due. *Taylor's Landlord and Tenant*, Sec. 573.

Trespass will lie for an illegal distress. *Taylor's Landlord and Tenant*, Sec. 768.

Any unlawful interference with the property of another is sufficient to maintain this action. *Allen v. Crary*, 10 Wend. 349; *Connah v. Hale*, 23 Wend. 462.

What the property sold for at sale is not competent to prove value. *Whitaker v. Wheeler*, 44 Ill. 440.

WALL, J. This was an action of trespass. It appears that J. S. Gary leased certain lots in the town of Gibson, upon which he erected works for the manufacture of flax. The lease was in writing and was to run five years from July 10, 1882. Gary failed and transferred the property to his mother, the appellee, living in Ohio, who sent another son to take charge of the property and, as it seems, determined to abandon the business and began to remove the machinery. At this point Speer, the lessor, claiming there was due him for rent \$100, placed a distress warrant in the hands of Howdyshell,

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a Constable. The warrant directed a levy upon the property of J. S. Gary, the lessee, and was levied upon certain of the machinery, etc., and such proceedings were had that at a sale subsequently held Speer bought the property in satisfaction of his claim. This suit was brought by appellee against the appellants, Speer and Howdyshell, and recovery predicated upon the proposition that under the distress warrant against J. S. Gary it was unlawful to levy upon the property of appellee, though it might be upon the premises and might have been placed there and formerly owned by the lessee. This question was presented by the pleadings, and the court, by its rulings, sustained the view of the plaintiff and held that such a levy was unlawful. In this we concur with the court. Our statute, Sec. 16, Ch. 80, provides that the landlord may seize, for rent, any personal property of the tenant that may be found in the county, but in no case shall the property of any other person, though the same may be found upon the premises, be liable to seizure for rent due from such tenant. This provision is a modification of the common law right in such cases and must control. The language is general and is not subject to construction—in no case shall the property of any other person be seized. The right to levy must be determined by the ownership of the property sought to be reached at the time of the levy, or perhaps of the delivery of the warrant to the officer. There is no lien except as to crops grown upon the premises. *Herron v. Gill*, 112 Ill. 247. It is not material that the property formerly belonged to the tenant or that it is still on the leased premises. If it has by a legal sale and delivery passed to another, it is not the subject of a levy under a distress warrant against the goods of the tenant. It is true that the statute provides, Sec. 32, that when the lease has been assigned the landlord shall have the same right to enforce his lien against the assignee that he has against the tenant, but in such case he should proceed against the assignee. It is not competent to proceed against the original tenant and take the goods of the assignee.

This disposes of the main question in the case, but assuming appellee was entitled to recover it is urged the verdict is

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grossly excessive. We are strongly impressed with the belief that the damages allowed, \$1,500, are much too high. The defendants were evidently not guilty of such acts as to make them liable for punitive damages, and as we read the evidence the actual damages by any fair computation, making reasonable allowance for differences of opinion of the witnesses, should have been much less than the sum fixed by the jury.

The court, by its first instruction, told the jury that "what the property sold for on the day of sale under the order of sale in evidence is not to be considered by you as evidence of the value of property."

It was error to give this instruction. It is no doubt true that such a sale is not conclusive evidence of the value, but it may under some circumstances be quite satisfactory. *Roberts v. Dunn*, 71 Ill. 46. When due notice is given and the attendance is considerable and the bidding active the result would test very fairly the cash value of the article sold. It was not for the court to say that under the circumstances of this sale the price realized was no evidence of the value.

It is urged that as the lease was abandoned the lessor might have recovered the whole amount of rent to accrue under the lease, and reference is had to section 33. We think this section applies only to a distress upon crops and does not cover this case, and that the court ruled properly in refusing instructions asked upon this point.

The court did instruct that the amount of rent due might be recouped, and we think, if asked to do so, it might go further and instruct that if the lease was abandoned the whole damage thereby occasioned to the lessor is a proper subject of recoupment in this action. As the lessor does not lose the use of the premises during the whole term he is not necessarily damaged the full amount that he would have received for rent. What his damage would be by reason of the breach of contract in such a case need not be discussed here.

For the error in giving the instruction referred to and because the damages are excessive, the judgment will be reversed and the cause remanded.

Reversed and remanded.

Workman v. Neal—Hall v. Black Brothers.

JOHN WORKMAN

v.

F. M. NEAL.

Injury to Personal Property—Jurisdiction of Justice.

A Justice of the Peace has jurisdiction of an action to recover damages for an injury to personal property.

[Opinion filed November 20, 1886.]

APPEAL from the Circuit Court of Sangamon County; the Hon. JAMES A. CREIGHTON, Judge, presiding.

Mr. N. M. BROADWELL, for appellant.

Messrs. PATTON & HAMILTON, for appellee.

Per Curiam. This was a suit before a Justice of the Peace to recover damages for injury to personal property, and was dismissed by the Circuit Court upon appeal, on the ground that the justice had no jurisdiction of the subject-matter. We think this was error, for reasons stated in the opinion filed in Skinner et al. v. Morgan, decided at this term. See also C. & A. R. R. Co. v. Calkins, 17 Ill. App. 56.

Reversed and remanded.

ROBERT HALL

v.

BLACK BROTHERS AND ELIJAH CARVER.

Bill to Enforce Claim against Estate—Chattel Mortgage—Fraud.

Upon a bill filed by two creditors of David Wright, deceased—one by simple contract and the other by a Justice's judgment on which no execution issued during the life of the decedent—neither of whom has proved his claim in the County Court against the estate, to reach the proceeds of the sale under an alleged fraudulent chattel mortgage, of most of decedent's

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estate, the defendants being the mortgagee and the administrator, it is *held*: That the bill is in effect a creditor's bill, and that the decree can not be sustained, as it ignores the County Court and the rights of other creditors and of the family of the deceased.

[Opinion filed November 20, 1886.]

APPEAL from the Circuit Court of Cass County; the Hon. CYRUS EPLER, Judge, presiding.

MESSRS. LEEPER & GRIDLEY, for appellant.

MESSRS. KETCHAM & GRIDLEY, for appellees.

PLEASANTS, P. J. The bill herein, filed by appellees, avers that on January 27, 1883, David Wright executed to appellant Hall a pretended note for \$1,100 and to secure it a chattel mortgage of nine horses, two cows, and the undivided third of 5,000 bushels of corn; that said note and mortgage were a fraud and a sham, made without consideration and to hinder and delay creditors; that Wright had no other property subject to execution; that he then owed Black Brothers, on note and account, \$253.58, and Elijah Carver \$85.50, which was afterward reduced to judgment before a Justice of the Peace; that he died in March 1883, and Harry C. Thompson was appointed administrator, but no property has come to his hands as such, nor does he know of any wherewith to pay Wright's debts; that Hall took possession of what was described in said mortgage, sold it thereunder for \$950 and claims the proceeds as his own.

It makes Hall and the administrator defendants and prays that the court cause the amount of Wright's indebtedness to complainants respectively, and the amount realized by Hall from the sale of the mortgaged property to be ascertained, and that Hall be ordered to pay complainants out of such proceeds, in full, if there be enough, and if not, *pro rata*.

In short, this is a bill filed by two creditors of decedent's estate—one by simple contract and the other by a Justice's judgment on which no execution issued during

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the life of decedent—neither of whom has proved his claim in the County Court, against the administrator and a third party who is alleged to hold by fraud about all of the estate, to compel the latter to pay their claims out of what he holds, even if it takes all to do it, without regard to the rights of the widow and children or other creditors.

Process was served on the defendants personally. The administrator was defaulted, but Hall answered that the note and mortgage were executed to secure existing indebtedness and advances to be made in good faith and not to defraud creditors, and that the proceeds of the mortgage sales—amounting to only \$676—were fairly applied upon Wright's debt to him. To which there was a replication.

It appears that Wright left a widow and five children, and that his whole estate, aside from the property described in the mortgage, would not exceed in value \$300. He was a tenant of Hall, and there was evidence tending to show that he owed him nearly \$400 on other accounts and had agreed to pay him \$600 cash rent for the year commencing March 1, 1883; that he owed Thompson \$200 or more and a little to other parties; that Thompson drew these papers and promised Hall to protect his claim. Hall says he sold the live stock for \$417 and the corn for \$261.12; that he had agreed to share the proceeds of the corn with Thompson *pro rata*, and that he paid him \$142.

On final hearing upon the pleadings and proofs a decree was made which does not find the allegation of fraud to be sustained, nor show what amount was found to have been realized on the mortgaged property, or what was allowed to Hall; but it does find due to Black Bros. \$330.98 and to Carver \$85, and that there was in Hall's hands subject to the rights of complainants, after allowing him all just credits, the sum of \$201.60, which it orders him to pay within forty days to the Clerk of the Court, to be divided and applied *pro rata*, as follows: On claim of Black Bros. \$160.39, and on that of Carver \$41.21. From this decree Hall appealed.

Since appellant did not see fit to demur to the bill, perhaps the court might have been sustained in applying any balance in his hands belonging to the estate upon complainants'

Bowers v. Davis.

claims *pro rata*, if there had been no widow or other creditor, though that is just what the County Court would have done in such case, and no reason is shown for taking the administration out of its hands. But upon the facts appearing in evidence as above stated, we think the decree here made was clearly erroneous. Complainants had no lien upon any property of the estate, nor were they for any reason entitled to preference over any other creditor, much less over the widow's award. Their claims were of the 7th class. Whatever of personal estate was left by decedent, in whosoever hands, belonged to the administrator, in trust to dispose of it as prescribed by the statute. It was his right and duty to recover or collect it, and then to apply it under the direction of the County Court upon personal expenses, widow's award, costs and debts, so far as it would reach, in proper order and proportion.

Enough appears from the findings of the decree and from the evidence to show there was really nothing here for creditors; and if there were, complainants would be entitled only with others, according to their class and in proportion to their amounts.

The decree giving them the whole, to the exclusion of the widow and other creditors, will therefore be reversed without prejudice to any proceedings to be taken by them in the County Court.

Decree reversed.

JOHN BOWERS

v.

S. O. DAVIS.

Action on Contract for Constructing Tile Ditch—Performance—Evidence—Commencement of Suit—Time of—Instructions.

In an action to recover for work done under a special contract for constructing a tile ditch, it is *held*: That the evidence tends to show a failure of performance of the contract, and that the court below erred in refusing

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an instruction as to the time of commencing the suit, the evidence tending to show that it was prematurely brought.

[Opinion filed November 20, 1886.]

APPEAL from the County Court of Moultrie County; the Hon. JONATHAN MEEKER, Judge, presiding.

Mr. WILLIAM SHINN, for appellant.

No counsel appeared for appellee.

Per Curiam. Appellee brought this suit before a Justice of the Peace to recover for work done under a special contract for constructing tile ditch and appealed to the County Court where there was a verdict and judgment for plaintiff for \$46.32 and costs. A new trial was denied.

The evidence strongly tends to show a failure by plaintiff to make the ditch as agreed in respect to depth and fall, and that defendant refused to accept it as it was. The court instructed the jury that plaintiff must show performance according to the original agreement, unless it was afterward changed by mutual consent—of which there was no evidence. A strong preponderance of the evidence also showed that defendant was to pay for the work in cash on the first day of August, or then give his note for it payable in one year with interest, and that this suit was commenced on the 28th day of July preceding. Yet the court refused an instruction that in such case plaintiff could not recover in this action.

For these errors the judgment will be reversed and the cause remanded.

Reversed and remanded.

Bice v. Hall.

SUSAN E. BICE
v.
OWEN H. HALL.

Wills—Freehold—Appeal—Practice.

1. Where a will devises real estate as it would not descend under the statute, a freehold is involved.
2. This court, for want of jurisdiction, dismisses an appeal in a case involving such a will, with leave to withdraw the record.

[Opinion filed November 20, 1886.]

APPEAL from the Circuit Court of Sangamon County; the Hon. JAMES A. CREIGHTON, Judge, presiding.

Messrs. PALMERS, ROBINSON & SHUTT, for appellant.

Messrs. PATTON & HAMILTON, for appellee.

Per Curiam. The County Court admitted to probate the proposed will of Benjamin L. Hall, but the Circuit Court on appeal reversed the order, and this appeal was taken.

The proposed will devises real estate in fee as it would not descend under the statute. A freehold is therefore involved. *Andrews v. Andrews*, 9 Ill. App. 408; S. C. 110 Ill. 223; *Newbury v. Blatchford*, 106 Ill. 584.

An appeal in such a case does not lie to this court. Appellant may have leave to withdraw the record if she so desired.

Appeal dismissed.

Hayden v. Henderson.

GEORGE HAYDEN, ADMINISTRATOR,
V.
MARTHA HENDERSON.

Claim against Estate for Services in Family of Deceased—Gratuitous Services—Presumption—Burden of Proof—Instructions—Evidence—Question for Jury.

1. The fact that a person residing with another has rendered gratuitous services raises no presumption that subsequent services of different character and rendered under different conditions are also gratuitous.

2. Where evidence tends to show that a claimant against an estate lived with the deceased as a member of her family, the burden is upon the claimant to show otherwise.

3. Instructions which contain all that is really applicable and important, although not every instruction is itself entirely accurate, are sufficient.

4. In the case presented, the sole question being whether the claimant was a member of the family of the deceased, it is *held*: That said question was for the jury, and that certain evidence touching the circumstances of the claimant, the intention of the deceased to make some provision for her and the value of her services and provisions furnished, is not objectionable.

[Opinion filed November 20, 1886.]

IN ERROR to the Circuit Court of Morgan County; the Hon. CYRUS EPLER, Judge, presiding.

Mr. A. A. LEEPER, for plaintiff in error.

The claimant having rendered services gratuitously to the deceased for several years prior to the time for which she claims pay, she can not charge for services afterward, in the absence of an express contract or notice to the deceased. *Woolsey v. White*, 7 Ill. App. 277.

The relations existing between plaintiff and deceased were those existing between members of the family, and before a recovery in such case can be had, an express contract must be shown. *Woolsey v. White*, 7 Ill. App. 277; *Neely v. Rich*, 7 Ill. 116; *Dunlap v. Allen*, 90 Ill. 108.

In the *Illinois Linen Co. v. Hough*, 91 Ill. 67, where two

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instructions were given, one for each of the parties—one stating an erroneous rule and the other a correct one—the court held that the giving of the correct instruction would not cure the error where the jury were left at liberty to follow either instruction, unenlightened as to which was the law. *Quinn v. Donovan*, 85 Ill. 194; *Cumins v. Leighton*, 9 Ill. App. 186.

Each instruction should be correct in itself and applicable to the facts. *Sweet v. Leach*, 6 Ill. App. 212.

Mr. E. G. WILSON, for defendant in error.

PLEASANTS, P. J. This was a claim filed in the County Court by defendant in error for services rendered and goods furnished to the deceased in her lifetime, from March 1, 1881, to April 1, 1884. It was taken by appeal to the Circuit Court, where a verdict was returned in favor of the claimant for \$400. A new trial was refused and judgment entered, to reverse which the administrator prosecutes this writ of error.

The deceased owned and was occupying by herself a house in Jacksonville, when, in 1877, the claimant, who was her widowed daughter-in-law, with two young children, came to live with her and so remained until her death in April, 1884. At whose instance or upon what understanding she came, does not positively appear. The evidence fails to show any express agreement between them in relation to wages, but it tends to prove that while she only assisted in the general house work until the spring of 1881, when the old lady's health and strength failed almost entirely, she thereafter virtually did it all, besides supporting and nursing the deceased so long as she lived. She took in work, went out to work, made and sold laces, and with means so obtained supplied the table and other necessities of the household. The value of what she did and furnished for the deceased was variously placed by witnesses, from \$2.50 to \$5 per week.

The court instructed the jury, in effect, that from the knowledge and acceptance of these services and provisions, they might, if they saw fit, infer a request, and thereupon

the law would imply a promise to pay for them what they were reasonably worth, unless a preponderance of all the evidence showed they were gratuitous, as to which the burden of proof was upon the defendant.

Plaintiff in error concedes that these instructions would have been substantially correct if the services had begun in 1881, but assuming that those previously rendered were gratuitous for whatever reason, insists that the law would presume those following were gratuitous, also, and that the burden was upon the claimant to show they were not, by proof of an express promise to pay or of notice in advance that she intended to charge for them.

Upon that hypothesis the court did so instruct for the defendant and, as we think, erred therein. Such would be the rule provided the services before and after March, 1881, were of the same general character and rendered under substantially like conditions. But no evidence was offered as to the terms of service before 1881, and if it had appeared that they were gratuitous, the conditions were then materially changed. We hold, however, that so far as the evidence on the part of the claimant tended to show that she lived with the deceased as a member of her family, if it did so tend, the burden was upon her to explain, overcome or avoid it by a preponderance.

The jury were also instructed that if her relations to the deceased were those of a member of the family she could not recover without proof of an express contract.

Thus, all that was really applicable and important was given, and although not every instruction was of itself entirely accurate as to the burden of proof in the condition above indicated, which was practically unimportant, we can not doubt that they conveyed to the minds of the jury a clear and correct idea of the issues and of the law.

Aside from the instructions there were three rulings to which the defendant took exception: 1. Witnesses were allowed to estimate the value of the services rendered and of the provisions furnished separately, and it is said that the services also included the provisions. We think otherwise.

Steere v. Brownell.

2. The testimony of one witness offered to show that when claimant came to live with deceased she was very poor and felt unable to keep a home of her own. This might well have been received, but her own repeated admissions to the same effect were received and not denied, so that no harm could have been done by the exclusion complained of. 3. A witness was allowed to testify that deceased told her she intended to make some provision for the claimant by will.

If this was improper it would seem to us to have been favorable to the defendant, implying more strongly that she was not, than that she was, according to her own understanding, under any contract or legal obligation to her.

The sole question was whether the parties understood the relations of claimant to be those of a member of the family. It was to be determined upon circumstantial evidence alone, and we agree it was a hard one. The jury may not have reached the right conclusion, but it was for them to judge and we see no sufficient reason for interfering with it.

Judgment affirmed.

ELISHA B. STEERE

V.

WILLIAM J. BROWNELL.

Sale under Chattel Mortgage—Delivery—Levy by Subsequent Creditor of Mortgagor—Replevin.

In an action of replevin, brought by the purchaser of the goods in question at a sale under a chattel mortgage, against a subsequent creditor of the mortgagor who had levied on the goods, claiming the delivery was insufficient, it is *held*: That the question being a close one, this court will not interfere with the judgment of the court below.

[Opinion filed November 20, 1886.]

APPEAL from the Circuit Court of McLean County; the Hon. O. T. REEVES, Judge, presiding.

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Mr. WILLIAM HUGHES, for appellant.

All conveyances of goods and chattels where the possession is permitted to remain with the donor or vendor, are fraudulent *per se* and void as to purchasers and creditors, unless the retaining of possession be consistent with the deed. Thornton v. Davenport, 1 Scam. 296; Kitchell v. Bratton, 1 Scam. 300; Rhines v. Phelps, 3 Gilm. 455.

Under a chattel mortgage the mortgagee must take possession of the property upon the default of payment of the debt. Suffering property to remain with a mortgagor after default of payment is a fraud *per se*, and is not subject to explanation. Reed v. Eames, 19 Ill. 594; Thompson v. Yeck, 21 Ill. 73; Constant v. Matteson, 22 Ill. 546; Hanford v. Obrecht, 49 Ill. 146; Wylder v. Crane, 53 Ill. 490; Rozier v. Williams, 92 Ill. 187; Wilson v. Rountree, 72 Ill. 570; Dunlap v. Epler, 88 Ill. 82.

Messrs. POLLOCK & BARR and BLADES & NEVILLE, for appellee.

We contend that the appellee did take possession promptly on default of payment by the mortgagor and undisputedly had possession for a period of fifteen days.

Our case is much stronger than that of Cunningham v. Hamilton, 25 Ill. 228. See, also, Funk v. Staats, 24 Ill. 632; Neece v. Haley, 23 Ill. 416; Reynolds v. Patterson, 4 Ill. App. 183.

Per Curiam. Replevin, brought by appellee for the brick, sheds and lumber in a brick yard owned by appellant, but which had been operated by C. S. Ripley. Pleas, *non cepit, non detinet* and property in the defendant. Trial by court, and finding and judgment for plaintiff for one cent damages and the costs.

In August, 1884, Ripley gave plaintiff a chattel mortgage upon the property in controversy and other of the same kind, together with a mare, colt, harness and all other personal property in the yard used in the business. In October, a Constable took the property under the mortgage, for plaintiff, left

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it in possession of a third party, who was employed in the yard, and fifteen days thereafter, on notice by posting, sold it to plaintiff, who bought at the request of Ripley, for the mortgage debt and costs. The operation of the yard ceased when the Constable took the property, but little if any other apparent change was made. Upon the purchase by plaintiff he left or put Ripley in charge, as agent, who made sales from time to time and accounted therefor to plaintiff.

In July, 1885, the property in controversy still remaining in the yard and in such possession of Ripley as is above stated, the defendant took a judgment by confession against him, and under the execution thereon the Sheriff levied upon and took it. It consisted of brick, burnt and unburnt, and in and out of the kiln. Plaintiff had taken away and sold the mare, colt, buggy and some of the brick. Defendant was not a creditor of Ripley when the mortgage was given or when the sale was made to plaintiff, and before he took this judgment was informed of the sale to plaintiff. But he, nevertheless, directed the levy of his execution upon what remained in the yard, and claims that there was no sufficient delivery to plaintiff. It was a close question, but almost every case of this kind presents on its trial peculiar features modifying the effect of testimony as it appears on paper, which we do not see, or can not rightly appreciate. Only a general rule, and a very general one, can be laid down to guide the trier. Each case stands by itself, upon its own circumstances. The trial judge, who saw and heard the witnesses and had the benefit of all the suggestions of counsel upon the motion for a new trial, was better prepared than we can be to weigh the evidence.

Quite a number of legal propositions submitted by the defendant were refused, but all that were substantial were embraced in those held; we can not indicate any clear error for which the judgment should be reversed.

Judgment affirmed.

I., B. & W. Ry. Co. v. Nicewander.

INDIANA, BLOOMINGTON & WESTERN RAILWAY COM-
PANY

V.

DANIEL NICEWANDER AND GEORGE H. LUTZ.

*Action to Recover Damages Resulting from Fire Set by Locomotive—
Secs. 63 and 104, Ch. 114, Starr & C. Ill. Stat.—Negligence—Question
for Jury—Evidence—Slight Error in Instruction.*

1. Under Sec. 63, Ch. 114, Starr & C. Ill. Stat., it is the duty of a rail-
road corporation to keep its right of way clear from all dead grass, dry
weeds and other dangerous combustible material, during the winter as well
as during the summer.

2. In an action for damages resulting from a fire set by defendant's loco-
motive, in January, it is held that evidence that defendant cut and burned
the grass and weeds upon its right of way in September or October previ-
ous, is not sufficient to show a full compliance with the law.

3. Under the evidence presented, this court holds that it was for the jury
to say whether the defendant was guilty of negligence under said section or
Sec. 104 of said chapter, and declines to interfere with their verdict.

4. A judgment will not be reversed for a slight error in an instruction
which could have worked no injury to the appellant.

[Opinion filed November 20, 1886.]

APPEAL from the Circuit Court of Champaign County;
the Hon. C. B. SMITH, Judge, presiding.

MESSRS. GERR & BEARDSLEY, for appellant.

MR. E. L. SWEET, for appellees.

CONGER, J. On the evening of January 10, 1885, fire
escaped from an engine of appellant, and caught either in
some dry grass upon the right of way, or in the stubble of
the adjoining field, and thence ran along the ground until it
reached and burned up three stacks of hay, belonging to ap-
pellees, standing some forty rods to the north of appellant's
track.

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Liability of the company is asserted upon two grounds, first, under Sec. 63, Chap. 114, Starr and Curtis Ill. Stat., which provides it shall be the duty of all railroad corporations to keep their right of way clear from all dead grass, dry weeds, or other dangerous combustible material, and for neglect shall be liable, etc. Henry J. Baker testified: "There was some dry grass upon the right of way at that time—grass was timothy, and grew up to within ten feet of the track. The ground was dry. There had been snow on the ground in the early part of the winter and up to Christmas and after, when it melted away and ground dried up."

Appellant offered evidence to show that the grass and weeds upon the right of way had been cut down and burned up during the September or October previous, and insist that this fact shows the highest diligence and full compliance with the law.

We are unable to see the force of the suggestion. The duty of the company is to *keep* its right of way clear from all dead grass, etc., and if the duty is properly performed during the summer, that is no reason why it may be suspended during the winter. Liability is also asserted under the provisions of Sec. 104 of said chapter.

We are satisfied from the evidence that the fire was communicated by the passing engine, and it is declared by the section above referred to, that such fact shall be taken as full *prima facie* evidence to charge appellant with negligence. To rebut this presumption, evidence was offered by appellant tending to show that the engine was properly managed by a competent engineer at the time, and was supplied with the best apparatus for arresting sparks known to the profession of locomotive engineers.

Under this proof it was for the jury to say whether appellant was guilty of negligence under either of the sections. If the fire started in the right of way from catching in the dead grass, and thence spread to the hay stacks, we can not say the jury were not warranted in reaching the conclusion they did. On the other hand if the jury believed from the evidence that the sparks flew over into the field, a distance of fifteen or

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twenty steps from the track, as testified to by Baker, and there started the fire—the jury might be warranted in regarding that fact as evidence that the engine was not in proper condition.

We can see no good reason for disturbing the verdict of the jury.

The objection to appellees' first instruction is quite technical. The fault is so slight that we can not think it could have worked any harm to appellant and will not therefore be noticed further.

The judgment of the Circuit Court will be affirmed.

Affirmed.

CITY OF HOOPSTON

V.

ROBERT MORRIS.

Execution against City—Proceeding to Recover Penalty for Sale of Intoxicating Liquor—Repeal of Ordinance—Practice.

In a proceeding to recover a penalty for the sale of intoxicating liquor in violation of an ordinance, this court declines to decide the effect of a repeal of the ordinance in question, as no brief has been filed by appellee, but reverses the judgment of the court below because it awards execution against the city.

[Opinion filed November. 20, 1886.]

APPEAL from the Circuit Court of Vermilion County; the Hon. J. W. WILKINSON, Judge, presiding.

Messrs. H. M. STEELY and JAMES H. DYER, for appellant.

The court in its final judgment on the verdict awarded an execution against the city. This was error. *Chicago v. Hasley*, 25 Ill. 595; *Kinmundy v. Mahan*, 72 Ill. 462; *Elgin v. Eaton*, 83 Ill. 535.

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No counsel appeared for appellee.

Per Curiam. This was a prosecution commenced in December, 1884, to recover a penalty for the alleged sale of intoxicating liquor in said city in violation of its ordinance. It was tried on appeal in the Circuit Court at the October term, 1885.

Meanwhile, in July, 1885, the City Council revised the ordinances, including the one relating to the sale of liquor. The revised ordinance contained the prohibitory section of the old ordinance *verbatim*, and section 2 of another chapter is as follows: "No fine, forfeiture, penalty, right, action, suit, debt or other liability whatever, created, instituted, incurred or accrued by or under any ordinance prior to its repeal or modification, shall be released, discharged, amended or repealed, or in any wise affected by the passage of such repealing or modifying ordinance, but the same may be prosecuted, recovered or enjoyed, or other suit or proceeding commenced or completed thereon, as fully and in the same manner in all respects as if such ordinance or part thereof had remained in full force, unless it shall be otherwise expressly provided in the ordinance making such repeal or modification."

It is conceded that revised ordinance repeated the one under which this prosecution was instituted and would therefore defeat this action unless it is saved by the section above quoted. The Circuit Court held that section to be prospective only and refused to admit it in evidence. There was a verdict and judgment for the defendant. We incline to concur in this construction of it, but as no brief has been filed for appellee, do not decide the question. The judgment, however, awarded execution against the city, which was error, and for this it will be reversed and the cause remanded.

Reversed and remanded.

ATOR v. RIX.

JOSEPH ATOR AND WILLIAM STUBBLEFIELD

v.

JOHN RIX AND WILLIAM RIX.

Replevin—Right of Possession at Commencement of Suit—Actual Possession—Lien—Statute.

1. In replevin the issue is upon the right of possession at the commencement of the suit.

2. Although, under the statute, the court will not deprive the plaintiff of actual possession where he has, since the commencement of the suit, acquired a right to it, there is no rule by which he may have judgment for a return upon the strength of an after-acquired lien.

[Opinion filed November 20, 1886.]

IN ERROR to the Circuit Court of McLean County; the Hon. O. T. REEVES, Judge, presiding.

Mr. THOMAS F. TIPTON, for plaintiffs in error.

The lien of the landlord was paramount to the rights of the plaintiffs, and the final judgment should have been for the defendants, with an order for the return of the grain and hay. The lien of Stubblefield on the grain and hay did not depend on his distress warrant or the prosecution of the distress case. *Hunter v. Whitfield*, 89 Ill. 229; *Mead v. Thompson*, 78 Ill. 62; *Wetsel v. Mayers*, 91 Ill. 497; *Prettyman v. Unland*, 77 Ill. 206.

Stubblefield had a lien on the grain and hay and is entitled to the possession to enforce his lien. *Wetsell v. Mayers*, 91 Ill. 499.

Mr. W. HUGHES, for appellees.

Per Curiam. This cause was submitted on an agreement as to the facts, from which it appears that Stubblefield, who was

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landlord of the defendants in error, by Ator as his bailiff, levied a distress warrant upon the crops growing and grown on the demised premises, and the tenants replevied, getting judgment for one cent damages and costs.

It is conceded that the distress proceeding was wrongful. The rent was not due nor was there any attempt by the tenants to remove the property contrary to the statute. It was in fact abandoned after this court reversed the judgment therein. Sec. 12, Ill. App. 313. But at the time of judgment in this case, the rent had accrued and remained unpaid, and on that ground it is claimed it should have been for the defendants, for a return of the property.

In replevin the issue is upon the right of possession at the commencement of the suit. By the statute, however, which is understood to be declaratory of the common law, if the plaintiff fails to prove he then had it, and yet shows that in the meantime he has acquired it, the court will not deprive him of his actual possession though obtained under the writ, but only adjudge him to pay the costs and such damages as the defendants shall have sustained. But we know of no rule by which, notwithstanding the wrongfulness of the original taking, the defendant may have judgment for a return upon the strength of an after-acquired lien. Here Stubblefield, even at the date of judgment, had not the right of property, but at most a lien which had not been pursued to possession. He must assert that in another proceeding. The statute specifies the cases, and we suppose all the cases in which the defendant may have such a judgment, and this is not among them. Sec. 22: Replevin. Nor is it such as would justify the alternative judgment therein provided for. The property was never rightfully held by the defendants for the payment of any money. The judgment will be affirmed.

Judgment affirmed.

Holmes v. Holmes.

JOHN P. HOLMES
V.
SERENA M. HOLMES.

Action by Sister against Brother on Note and for Wages—Question for Jury—Instructions.

1. Where the question is one of fact and the evidence is conflicting, it is for the jury to determine which side has the preponderance of the evidence.

2. In an action by a sister against her brother to recover wages claimed to be due her for services in his family, and also to recover on a note, it is held that, as the question of liability rested upon an alleged express contract, a certain instruction complained of contained no serious error.

[Opinion filed November 20, 1886.]

APPEAL from the Circuit Court of Macon County; the Hon. C. B. SMITH, Judge, presiding.

Mr. I. A. BUCKINGHAM, for appellant.

Messrs. OUTTEN & VAIL, for appellee.

Per Curiam. The parties are brother and sister. She brought this suit for money alleged to be due her on a promissory note, and also for wages, and recovered a judgment for \$1,039.85.

Exception is taken to one instruction for the plaintiff, that it is misleading as to the circumstances to be shown, in order to exempt the head of a family from liability for wages to one claimed to have sustained the relation of a member of it. That part of the instruction related to a case resting upon an implied contract—we perceive no serious error in it—but this case rested upon an alleged express contract, positively testified to by several witnesses, and the instruction proceeds upon that hypothesis.

It was that, although under certain circumstances stated, the law would not hold the defendant liable for wages without

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proof that he was to pay them, yet if there was an express and valid contract to pay them, he would be liable notwithstanding such circumstances. There can be no reasonable doubt that the jury found there was such a contract. Aside from this the case presents only questions of fact, and it is not denied that there was much evidence to support the finding. A labored argument is made to show it did not amount to a preponderance. Of that the jury were the proper judges.

Judgment affirmed.

 SAMUEL S. CHISHOLM ET AL.

V.

F. F. RANDOLPH ET AL.

Mechanic's Lien—Averment in Petition as to Lot Improved—Completion—Time of—Extension of Time of Payment Beyond One Year—New Note—Effect of Extension on Lien.

Upon a petition for a mechanic's lien, a demurrer having been sustained by the court below, it is *held*: That an averment that the improvements in question were to be made upon a certain lot, although the contract refers to no particular lot or tract, is a proper averment of fact, the truth of which the demurrer admits; that the completion of said improvements dates from the making of a working test; that whether a note at nine months was paid by the giving of a new one depends upon the intention of the parties; that the contract, as existing when the performance was begun, must determine for all parties whether a lien was created, and for subsequent creditors, incumbrancers and purchasers when the limitations prescribed in Sec. 28 began to run; and that, subject to the operation of said section in this view of the contract, no indulgence between the parties to it in respect to the time of completing the work, or of paying for it, divested the lien when once attached.

[Opinion filed November 20, 1886.]

APPEAL from the Circuit Court of Coles County; the Hon. C. B. SMITH, Judge, presiding.

Messrs. WILEY & NEAL, for appellants.

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Mr. I. A. BUCKINGHAM, for appellees.

PLEASANTS, P. J. The question in this case is upon the sufficiency of the petition for a mechanic's lien, which was dismissed on demurrer thereto sustained.

By agreement in writing of May 10, 1882, appellants were to put into the flouring mill at Charleston, Illinois, owned by appellee Randolph, certain machinery and improvements, and have the same complete and in running order by the first day of August then next, with certain guarantees, general and special, as to its performance, "if run according to their program, by a person agreeable to them." Randolph was to pay therefor \$18,500, as follows: In cash, during the performance of the work, all freights, weekly wages of workmen and other sums, up to \$10,500, on the machinery and other articles furnished, as they should arrive, up to said first day of August; and "at the expiration of the time set, and upon completion and satisfactory performance as above stated of said mill," execute his promissory notes for the balance in four installments, at three, six, nine and twelve months respectively.

The work was done by the day so fixed, but the mill was not tested and accepted until the 15th of September, when the notes were executed. All were duly paid except the one at nine months for \$2,105, which was assigned before maturity to the Nordyke & Marmon Company, an Indiana corporation. Upon this he desired an extension, which the assignee declined to grant unless appellants would guarantee its payment. They assented, and thereupon it was surrendered and a new one, dated June 15, 1883, for the same amount, at four months, with interest at eight per cent., was executed by him to said company and guaranteed by appellants. This remaining unpaid at maturity, suit was brought thereon in the name of the company against Randolph, to the November term, 1883, of the Circuit Court for Coles County, and judgment obtained for \$2,179.29, and on the first day of that month the original petition herein was filed.

Such are the facts as set forth in the amended petition; which further avers that the note to the company was not given or

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accepted, or understood to be in satisfaction of the one surrendered, and that when the original petition was filed appellants held and controlled said new note and now absolutely own and control said judgment, which they are ready to satisfy, transfer or otherwise dispose of as the court may direct, and that it is wholly unpaid. It also describes the lot of land on which the mill is erected and avers it was the lot intended in the contract.

The other appellees were made defendants as having or claiming, respectively, some interest in the premises which is alleged to be subject to appellants' lien, and the prayer is in the usual form in like cases.

On behalf of appellee it is said, first, that the contract set out does not refer to any particular tract of land or town lot. To which the sufficient answer is that the petition avers it does refer to the tract therein described. The contract itself does not describe any tract or town lot, but speaks of the work and improvements contracted for as to be made and done "in the flouring mill in Charleston, Illinois, owned by said party of the second part," which necessarily implies some tract or lot of land, and the application of this reference may be fixed by averment and proof. It is not an averment of a conclusion but of a fact, and its truth is admitted by the demurrer.

It is further contended that by the contract the first day of August, 1882, was the time stipulated for the completion of the work and furnishing the materials, and the time of payment being beyond one year thereafter, no lien was created. R. S. Ch. 82, Sec. 3.

We think the fair construction of the contract is, that by the first of August all the machinery was to be set up in running order, and all the improvements made ready to be tested, but whether completed according to the contract and the guarantees of the mill's performance therein contained, was still to be determined by the working test, for which Randolph was to have a reasonable time. The averment is that all the work was done and the mill ready for this test by the first of August, but it was not known to be so done as to require no

further work of appellants until the 15th day of September. The facts stated conclusively imply that both parties understood that to be the time of completion as intended by the contract.

Next it is claimed that the note at nine months was paid by the giving of the new one to the Nordyke & Marmon Co., and thus the lien was extinguished. That would depend upon the intention of the parties. *Bayard v. McGraw*, 1 Ill. App. 140-1; *Bond v. Insurance Co.*, 106 Ill. 654. And the petition avers it was not so intended. That appellants held and controlled that note when the petition was filed, and now own and control the judgment, is sufficient as an averment—by what means they own it being matter of evidence.

But the new note did extend the time of payment of a part of the contract price one month beyond a year from September 15, 1882, and the principal question made is whether such extension defeated or divested the lien.

The original contract was clearly such as to create a lien, being strictly within the statute providing for it. By it the debtor was bound to pay within a time not beyond a year from the completion of the work. If, after being so bound, the creditors saw fit to indulge him for a short time, carrying the payment beyond the year at his request, should they therefore lose their lien acquired by the contract?

The statute is silent on that question. No authoritative construction bearing directly upon it has been cited. No satisfactory reason has been suggested for it. On principle we see none. It is true that the statute is to be strictly construed as against the party claiming the lien. He must bring his case within its terms. Here the petitioners have done it by showing such a contract as the law requires, and its performance on their part. It is held that their right to it must depend on the contract as originally made. If it did not comply with the terms of the statute, no subsequent change or amendment could help it. *Cook v. Heald*, 21 Ill. 425. But it has not been held, so far as we are advised, that the lien, having once attached by means of such an original contract, would be divested by an indulgence of the debtor as to payment beyond

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the time thus stipulated for it. He surely ought not to complain or attempt to take advantage of such indulgence granted at his own instance. Nor do we see any reason why subsequent creditors, incumbrancers or purchasers should complain, unless it is extended more than six months beyond the time specified in the original contract. They deal with the property at their peril. They are presumed to know the law, and must ascertain, as best they may, whether it is incumbered with such a lien. If it is, their claim is subject to it. *Clark v. Moore*, 64 Ill. 273. The creditor is not required to institute proceedings to enforce it within any definite time, except that prescribed by the general Statute of Limitations, as against the debtor, nor as against any other creditor or incumbrancer, except within that prescribed by section 28 of the Lien Act, which is six months after the last payment shall have become due and payable. Then, since he may actually indulge the debtor to this extent, what forbids his agreeing to do so, if nobody is thereby put in a worse condition? Here such proceedings were instituted within two months after the time fixed by the original contract for the last payment, and no party has been injured by the indulgence shown.

In *Cook v. Vreeland*, 21 Ill. 436, speaking of Sec. 2 of the former act, which corresponds with Sec. 3 of the one now in force, the court say: "This section evidently refers to the making and entering into the contract, when it prohibits (limits) the extension of the time for completing the work to three years and the time of payment to one year after its completion. There can not be anything else referred to but the contract, and that, we think, is the time fixed when the contract is first entered into by the parties, and not to a mere permission to complete the work after the expiration of the time, or an extension of the time for payment beyond the period first agreed upon."

We hold, then, that the contract, as existing when performance is begun, must determine for all parties whether a lien is created, and for subsequent creditors, incumbrancers and purchasers when the limitation prescribed in Sec. 28 will begin to run; and that subject to the operation of that section, in this

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view of the contract, no indulgence between the parties to it, in respect to the time of completing the work, or of payment for it, will divest the lien once attached.

We think the demurrer to the petition as amended was improperly sustained; and the decree will be reversed and the cause remanded for further proceedings in conformity with this opinion.

Reversed and remanded.

SECOND NATIONAL BANK OF DANVILLE ET AL.

V.

CHARLES L. ENGLISH ET AL.

Insolvency—Jurisdiction of County Court—How far Exclusive—Circuit Court has Jurisdiction of Bill to have Trust Deed Canceled—§ 47, Sec. 11, Chap. 72, Starr & C. Ill. Stat.

1. The Circuit Court has jurisdiction of a bill filed by creditors and the assignee of an insolvent to have a trust deed covering his real estate canceled and annulled and the property passed over to the assignee.

2. The exclusive jurisdiction of the County Court as an insolvent's court does not extend to a proceeding brought by the assignee and others, to remove a cloud from the title of property claimed to be a part of the insolvent's estate.

[Opinion filed November 20, 1886.]

IN ERROR to the Circuit Court of Vermilion County; the Hon. J. W. WILKINS, Judge, presiding.

Messrs. H. P. BLACKBURN, W. J. CALHOUN and LAWRENCE & THOMPSON, for plaintiffs in error.

The relief sought by the bill is to remove a cloud upon the title of the assignee Frazier, or to remove an impediment in the way of a sale of the property assigned to him. A court of equity has exclusive jurisdiction for this purpose. *Farnsworth v. Strassler*, 12 Ill. 482; *Moore v. Munn*, 69 Ill. 591; 2 Story's Eq. (2d Ed.) Sec. 700.

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The County Court has limited jurisdiction, and only over matters especially provided by the statute. It is not empowered to enter a decree canceling a deed of record in the office of the recorder of deeds. It has no equitable jurisdiction. *Propst v. Meadows*, 13 Ill. 157; *Dixon v. Buell*, 21 Ill. 203; *Moore v. Rogers*, 19 Ill. 347; *Pahlman v. Graves*, 26 Ill. 405.

Messrs. DAVIS & MANN, for defendants in error.

PLEASANTS, P. J. On July 27, 1885, Wm. W. R. Woodbury made a general assignment to DeWitt C. Frazier for the benefit of his creditors, which was filed for record at 3:45 o'clock P. M. of said day and purported to convey all the real and personal property of the assignor, wherever situate and of whatever nature, without a more particular description. His indebtedness was listed at \$111,217.77 and the assets were estimated at \$115,429.55.

At 3:40 P. M. of the same day there was also filed for record a deed of conveyance of divers lots of real estate from said Woodbury to Charles L. English, as trustee of the other defendants in error, who were respectively sureties on several items of said indebtedness for something over \$28,000, to indemnify them against loss by reason of such suretyship.

The bill herein was filed by creditors whose claims aggregated about \$30,000, on behalf of themselves and such others as should join in and contribute to the expense of the proceeding, and by order of the County Court, on their petition, the assignee was also made a party complainant, by an amendment thereto.

Besides the facts above stated it avers, on information and belief, that the estate assigned will not realize more than \$50,000; that the lots described in the deed of trust are of the value of about \$25,000; that the larger part of complainants' claims have been duly verified and presented to the assignee as required by the statute; that they are believed to constitute a majority of the indebtedness of said insolvent, exclusive of his liabilities to said sureties; that said deed of trust and

assignment were executed simultaneously, prepared by the same attorney for said insolvent, acknowledged at the same time before the same officer and together filed for record; that for several days immediately preceding said 2d day of July, said Woodbury intended and contemplated the making of said general assignment, and that the execution of said deed of trust was a shift and device to evade the statutes, and expressly intended to prefer said surety creditors, and prays that said deed be canceled and annulled, and all the estate of said Woodbury in the property therein described, decreed to pass to said Frazier by virtue of said deed of assignment for the uses and purposes therein expressed.

To this bill the defendants demurred, and for cause said: It set up no matter or thing within the jurisdiction of said court, and that all the matters and things therein set forth are wholly within the jurisdiction of the County Court of Vermilion County.

The court sustained this demurrer and dismissed the bill, and the complainants appealed.

As we understand it, the single question presented by this record is that of the jurisdiction of the Circuit Court, and it would seem to be important on account of the interest involved, if for no other reason. Yet counsel have not deemed it necessary to aid us in its solution by any extended argument.

The brief for appellants devotes to it three lines, and cites four cases of which the latest is from 26th Ill. That of appellees is briefer still, simply referring us to Freydendall v. Baldwin, 103 Ill. 325; Hanchett v. Waterbury, 115 Ill. 220; and Field v. Ridgely, 116 Ill. 424, without a word of comment.

The case made by the bill is certainly of a character quite familiar in equity practice, and clearly within the original jurisdiction of the Circuit Court as conferred by the Constitution, and if it could not be exercised in this particular instance, it must have been only because that of the County Court, not by virtue of its general powers as such, but as an insolvent's court under the Act of May 22, 1877, relating to voluntary assignments for the benefit of creditors, had first attached. It

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is settled by the authorities cited for appellees and by others, that all the property the insolvent debtor has at the time of the assignment passes to and vests in the assignee under the statute, and must be administered by him under the supervision of the County Court; that upon the making, filing and recording of the assignment, with the lists and schedules annexed, the County Court at once acquires jurisdiction over and becomes possessed of all the property and estate embraced within the assignment, subject, of course, to all prior liens and just claims that third parties may have to or upon it; that if, after the jurisdiction of the County Court has attached, third parties having real or pretended claims to or upon the trust estate were permitted, by means of process issued out of other courts, to take possession of the property in the hands of the assignee for purposes of litigation in such other courts, the County Court might be deprived of its jurisdiction altogether, and, in any event, would be so retarded and embarrassed that it would be impossible to administer the estate in the manner or within the time prescribed by the act; that the assignee, the insolvent debtor and all persons claiming an interest in the fund are subject alike to the summary jurisdiction of that court, and all rights, or real supposed, with respect to it, must be primarily litigated therein, and that when its jurisdiction has attached, no other court can interfere for the purpose of adjusting any claims with respect to the property assigned, or of administering the insolvent's estate, except, perhaps, that under special circumstances a court of equity may intervene to prevent a failure of justice.

The foregoing is taken almost *verbatim* from the opinions in the cases cited, and is believed to show the full extent to which the courts have yet gone in reference to the exclusiveness of the jurisdiction of the County Court under this statute.

It will be noticed that these holdings imply, as the fact was in the several cases, (1) that there was no question as to what was embraced in the assignment; (2) that the County Court was in actual possession of the property in controversy or its proceeds; (3) that the intervention of another court was sought by some creditor or claimant against the assignment.

or some claim thereunder, and (4) that the proceeding if sustained, would have taken the property from the possession of the County Court, or overruled its order in relation thereto.

In such case the claimant must first litigate in that court because it is competent to grant him any relief, legal or equitable, that could be obtained in any other. Upon his petition it may in effect try the title or right to possession of real or personal estate, of whatever value, or the validity or priority of any alleged lien or other claim to or upon it. By means of its actual possession of the *res* and of its authority over the assignee in whom is the legal title, it is enabled to do whatever justice, as between the parties, may demand. Its judgment is enforced by personal order upon the assignee to do or refrain from or submit to whatever may be necessary to that end, as to deliver possession of property, real or personal, or to execute, cancel or surrender instruments in writing relating to it, as the nature of the case may require. Hence there is no necessity for an action of ejectment or bill in chancery, in another court, at the suit of the claimant. If the judgment is against him the conditions remain unchanged, and it is binding until duly reversed or vacated, because his petition has given the court the necessary jurisdiction over him and the statute confers it as to the subject-matter and the respondents claiming under the assignment.

But does it follow from its possession of these powers in such cases that it can, by virtue of this statute in any case, render a judgment in ejectment or decree in equity, or make any order affecting one who is neither a party to nor claiming under the assignment and touching any property or interest which he does not concede to be embraced in it, and also in the possession of the court? If so, its jurisdiction in such case must be exclusive. But that it is not would seem to be clear from the provision in Sec. 11 of the statutes, which expressly authorizes the assignee "to sue for and recover everything belonging or appertaining to said estate, real or personal," the suits here contemplated being evidently to be brought against just such parties, claiming and holding ad-

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versely, in any courts having jurisdiction under the general law.

If it be true that appellants, by petition to the County Court for an order upon its assignee to sell subject to their claim, or to reserve enough of the proceeds for their indemnity, might have given it jurisdiction to determine this controversy, still they were not bound to do so. Nor have they sought the intervention of another court. This bill was filed *in invitum*, by the assignee and certain of the creditors. It shows that the defendants are not parties to nor claiming under the assignment, that they hold an apparent though a contingent incumbrance upon a large portion of the real estate assigned, by what purports to be a prior and valid deed that is of record; that this deed is really void, but nevertheless a cloud upon the title of the assignee, which, if it remains, must greatly injure his sale and by consequence the interests of the creditors. His duty was to do what he reasonably could to bring the property to sale under the most favorable conditions, and therefore to have this cloud removed. *Goodwin v. Mix*, 38 Ill. 115; *Burrill on Assignments*, Sec. 408.

But the position of the defendants was like that of parties in adverse possession of property described in the assignment, so that, as respects their interest or claim, the jurisdiction of the County Court under this act had not attached. And if it had, for any purpose, it was at least doubtful whether it could grant the proper and needed relief by canceling the deed of trust. He therefore filed this bill in another court whose powers under the general law is confessedly ample, and since a dollar saved to the estate is a dollar recovered for it and a suit was necessary to save it, we hold this to be one that is fairly within the letter and spirit of the provision in Sec. 11 above referred to.

The case here differs from those cited in the four particulars above mentioned and is analogous in principle to that of *Preston v. Spaulding*, 18 Ill. App. 350-1, where the assignee and a creditor sought to have declared void, as amounting to preferences, certain judgments confessed by the assignor

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on which executions had been issued and were claimed to be liens upon the property assigned, and to enjoin the Sheriff from making sales, and the jurisdiction of the Circuit Court, upon question made and argument had, was fully sustained.

Here the County Court itself invokes its exercise, and if the relief sought should not be granted, the denial will work no change in its possession or control of the estate assigned.

We are of opinion that the Circuit Court erred in sustaining the demurrer and dismissing the bill. The decree will therefore be reversed and the cause remanded for further proceedings in conformity herewith.

Reversed and remanded.

DEXTER A. SMITH

V.

JOHN MUNCH.

Action on Note—Assignment—Notice of Defense—Failure of Consideration—Admissibility of Evidence—Practice—Defective Transcript and Abstract.

In an action on a note on the face of which certain matter appeared, it is *held*: That evidence of a failure of consideration was admissible if the holder had notice, or was fairly put upon inquiry; that this was a question for the jury; that the matter on the face of the note was admissible in connection with other facts to prove such notice; and that this court can not interfere with the verdict of the jury finding that the holder was not a *bona fide* assignee.

[Opinion filed November 20, 1886.]

APPEAL from the Circuit Court of Moultrie County; the Hon. J. F. HUGHES, Judge, presiding.

Messrs. COCHRAN & HARBAUGH, for appellant.

Where a promissory note is indorsed by the payee without

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date, it will be presumed, in the absence of proof, that it was assigned at the date of the execution of the note. *Smith v. Nevlin*, 89 Ill. 193.

If the time of the assignment of a note becomes material, it is incumbent on the maker to show that it was made after the maturity of the instrument where the indorsement is without date. *Mobley v. Ryan*, 14 Ill. 51.

The writing below the signature and marginal line of said note is no part of it. There is no evidence that it was there when the note was signed, or that any one authorized to do so caused it to be written there. It certainly could not be construed so as to make it appear to one purchasing the note as notice of a defense to the note. *Owen v. Barnum*, 2 Gilm. 461; *Carr v. Welsh*, 46 Ill. 88.

Mr. W. H. SHINN, for appellee.

PLEASANTS, P. J. The abstract in this case hardly complies with the rule and the transcript is not what it should be.

It is a suit in assumpsit by appellant, as assignee, against appellee as maker of a note, in special form and printed, to D. M. Osborne & Co. for \$100, dated August 1, 1882, and payable on or before January 1, 1884, at the Merchants' & Farmers' Bank in Lovington, Illinois. It embraced a certificate by the maker, "for the purpose of obtaining the property for which it was given," that he owned in his own name — acres of land in section —, township —, etc., and \$1,500 worth of personal property on it over and above all his indebtedness. Under the signature was written: "This machine to be put in running order by the harvest of 1883, when starting in 100 Oct. 1st, '83." Appellee says it also shows on its face, in the lower left hand corner, the following: "[number on the machine—9]"; and at the bottom, on margin, the printed words: "Other notes in payment for same machine given to D. M. Osborne & Co."; but if there the transcript of the record omits them.

It was stipulated that any defense which could be well pleaded might be given in evidence under the general issue

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filed. A verdict was returned for the defendant, a motion for a new trial denied and judgment entered. .

The bill of exceptions shows that plaintiff offered in evidence "the note sued, also the writing on the margin," which were admitted, and he then rested; but the assignment indorsed is also copied in the transcript, together with the other matter above mentioned.

Assuming that it was all treated as in evidence, the only material question in the case is upon the propriety of the court's ruling in admitting proof of the failure of the consideration or conditions on which the note was given, notwithstanding it appeared that plaintiff was in possession of it before maturity.

It was proper if he had actual notice of these facts or was fairly put upon inquiry in relation to them before he got it.

Whether he was so notified or put upon inquiry was a question of fact for the jury; and all the matter appearing on its face—since it had been under the control of the payee and plaintiff from the time of its execution—was admissible, in connection with other facts in evidence, as tending to prove it. *Henneberry v. Morse*, 56 Ill. 395; *Russell v. Haddock*, 3 Gilm. 233. It was further proved that after maturity, in the spring of 1884, it was in the hands of the general agent of D. M. Osborne & Co., with plaintiff's approval, and that this agent demanded payment for them of appellee.

The jury found that appellant was not a *bona fide* assignee for value and without notice of the defense as against his assignors, and we are unwilling to say they were not justified by the evidence.

Judgment affirmed.

Village of Mansfield v. Moore.

THE VILLAGE OF MANSFIELD

V.

LOVINA J. MOORE.

Defective Sidewalk—Location of—Injury—Action for Damages—Instructions—Negligence—Definition—Notice—Question for Jury.

1. Where a sidewalk, built and maintained by a municipality within its corporate limits, is located on the right of way of a railroad company and is necessary for the use of the public, the corporation is responsible for its condition.

2. Neither actual nor constructive notice is required to be shown in case of defective construction.

3. Negligence is the want of that degree of care which the law requires in a given case.

4. An omission in an instruction is not error if it is supplied elsewhere in the instructions given.

5. Where the evidence is conflicting this court will not interfere with the verdict of the jury.

[Opinion filed November 20, 1886.]

APPEAL from the Circuit Court of Piatt County; the Hon. J. F. HUGHES, Judge, presiding.

Messrs. LODGE & HUSTON, for appellant.

The instructions are erroneous. *Chicago v. Bixby*, 84 Ill. 82; *Grayville v. Whitaker*, 85 Ill. 439; *Chicago v. McGiven*, 78 Ill. 347; *Chicago v. Watson*, 6 Ill. App. 344; *Macomb v. Smithers*, 6 Ill. App. 470; *Joliet v. Walker*, 7 Ill. App. 267; *Chicago v. McCulloch*, 10 Ill. App. 459; *Owen v. Chicago*, 10 Ill. App. 465.

It is a very dangerous practice to give erroneous instructions for a plaintiff and rely on the defendant's instructions to correct or modify them. The better rule is laid down in the following cases: *W., St. L. & P. Ry. Co. v. Rector*, 104 Ill. 296; *Same v. Shacklet*, 105 Ill. 364; *I. C. R. R. Co. v. Moffitt*,

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67 Ill. 431 ; Am. Ins. Co. v. Crawford, 89 Ill. 62 ; Wabash Ry. Co. v. Hanks, 91 Ill. 406 ; Singer M'f'g Co. v. Pike, 12 Ill. App. 506.

Appellee's briefs removed from file.

PLEASANTS, P. J. This suit by appellee, for personal injury ascribed to defective construction or condition of a sidewalk, resulted in a judgment on verdict for plaintiff of \$1,800. We find no substantial error against appellant in any of the rulings below.

It is said the walk, at the place where the accident occurred, is not on a street, but within the right of way of the I. B. & W. R. R. Co. It is, however, within the corporate limits. The village authorities built and took and had charge of it for use as a sidewalk by the inhabitants and others generally, and it was so used without hindrance or objection by the company. Its necessity and importance to the public are conceded. These facts made the village corporation responsible for its condition, as for that of any other. Dillon on Mun. Corp. § 1009.

The effect of Bruffett's testimony, in connection with that of others, was for the jury to determine. In defendant's instructions 8 and 9 they were fully advised with reference to the event of their finding that the defective place testified of was not the place where the accident occurred.

The first and third, for plaintiff, are upon the hypothesis of absolute negligence on the part of defendant. This, of course, included notice where that is necessary to constitute it, and in what cases it is so necessary was clearly stated in others on both sides. Negligence is the want of that degree of care which the law requires in a given case, and the degree required in this case was also fully set forth in others. There was, therefore, no error or inconsistency in the omission complained of in these.

So that of the words "reasonably safe" or their equivalent, before "repair," in the fifth, could not have been misunderstood in the face of their use in the same connection in so many other places.

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Neither actual notice, nor constructive by lapse of time, is required to be shown in cases of defective construction.

Upon disputed questions of fact there was a conflict of evidence, and this is the third jury that has agreed the same way in relation to them. The judgment will be affirmed.

Judgment affirmed.

WILLIAM P. BRINTON

V.

HERMAN EINHAUS.

Negotiable Paper—Action against Payee as Indorser—Former Adjudication as to fact of Payment before Transfer.

In an action against the payee as indorser on a note transferred to plaintiff after maturity and payment, it is *held*: That the defendant is liable for the amount of the note, and that the judgment establishing the fact of payment, in a suit by the plaintiff to foreclose a trust deed securing the note, is conclusive, the defendant having been a party to the foreclosure proceedings.

[Opinion filed November 20, 1886.]

APPEAL from the Circuit Court of Adams County; the Hon. WILLIAM MARSH, Judge, presiding.

Messrs. BONNEY & WOODS, for appellant.

Mr. IRA N. MOORE, for appellee.

The transfer of a chose in action as unpaid amounts to an implied warranty that it is unpaid. Robinson v. McNeill, 51 Ill. 225; Plain v. Roth, 107 Ill. 588; Brown v. Montgomery, 20 N. Y. 292; Morford v. Davis, 28 N. Y. 481; Watson v. Chesine, 18 Iowa, 202; Kingsley v. Fitts, 55 Vt. 293.

Where a note is assigned after maturity, the assignor, under our statute, assumes to pay the note if the bringing of a suit

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would prove unavailing. R. S. 1874, Ch. 98, Sec. 7; Crouch v. Hall, 15 Ill. 263; Kestner v. Spath, 53 Ind. 288.

The indorsement of this note by the defendant after maturing is equivalent to the drawing of a new note payable at sight. Light v. Kingsbury, 50 Mo. 331.

PLEASANTS, P. J. This case has been needlessly complicated by the introduction of what is considered irrelevant matter. A statement of the material facts will suffice, without argument, to show that the judgment for appellee was right.

On January 15, 1875, William H. Cather gave his note to appellant for \$500, due three years after date, with interest at ten per cent. per annum, payable semi-annually, which, with another for \$1,000 to another party, was secured by a trust deed of real estate. In the summer or fall of 1882, appellant indorsed it in blank, and delivered it for negotiation to Warren F. Pitney, who sold it to appellee for its face value, less about five dollars of interest last accrued and which was unpaid and the interest previously accrued, which was endorsed and paid. In October, 1883, appellee filed his bill in equity to foreclose the trust deed, making Cather and his wife, the trustee, the payee of the other note and the appellant here defendants, all of whom except the trustee answered, and the holder of the other note also filed her cross-bill making all the others named defendants thereto, all of whom except said trustee answered, and replications to the answers to original and cross-bills were filed. At the June term, 1884, on final hearing upon said pleadings and the proofs, the court found, among other things, "that said \$500 note, payable to said Samuel P. Brinton, has been paid by said William H. Cather, and that the same had been paid off by said Cather before the same was transferred to said Einhaus, and that said Einhaus obtained said \$500 note four years after the same had become due and payable, from one Warren F. Pitney, and that said Pitney was not authorized by said Cather to transfer the same to said Einhaus, and that said Cather never authorized the transfer of said note to said Einhaus." The de-

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cree accordingly dismissed the original bill at complainant's costs and "forever barred" him "from enforcing payment of said \$500 note from said William H. Cather, and from enforcing any lien on or against the real estate in said deed of trust described, reserving, however, to him, any legal rights he may have against said Pitney and said Brinton, growing out of the purchase of said \$500 note."

Thereupon Einhaus wrote over the signature of appellant on the back of said note a special assignment to himself, and brought this suit to the next term against him as assignor, charging in several counts, respectively, among other things, that suit against the maker at any time since the assignment would have been unavailing, and that the defendant by such assignment warranted that said note except the interest thereon to that date was unpaid, and that if it had been unpaid it would have been worth \$500, but that it had then been fully paid and was worthless, to which several special pleas were interposed, but afterward withdrawn upon a stipulation that any proper defense might be introduced under the general issue.

By agreement the case was tried without a jury, and upon a finding of the issues for plaintiff and assessment of his damages at \$595.25 the court, after refusing a new trial, rendered judgment.

Appellant introduced evidence, against the record of the decree referred to, that when he parted with the note it had not in fact been paid, and also claimed that his assignment was not to appellee but to Pitney; whether that claim, if substantiated, would help him, we need not determine, for though it appears there was a time when he so understood it, and Pitney knew he did, his own testimony shows it was not until after the sale to appellee. He admitted that he delivered the note to Pitney, as his agent, to raise money upon it, but says that some time afterward Pitney told him he had concluded to keep it himself, though he could not then pay for it in full, but he did then pay him \$300, and the residue within a few weeks, which \$300 was part of the proceeds of its sale to appellee. Pitney testified that he made the sale to appellee, and

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appellee that he made the purchase of Pitney, as agent of appellant.

That it had then been paid by the maker is established by the finding and decree mentioned, which are conclusive in this suit.

It thus appearing that he assigned the note to appellee for a valuable consideration after it had been paid by the maker, his liability under either of the special counts referred to would seem to be clear. No citation of authorities is deemed necessary.

Whatever of hardship to him may be in this judgment must be due to the former adjudication of the fact of such payment. That adjudication remains in full force, and appellee was no more bound than he to prosecute an appeal or writ of error thereon.

Judgment affirmed.

INDIANA, BLOOMINGTON & WESTERN RAILWAY COMPANY
V.
SAMUEL DRUM.

Railroads—Killing of Stock—Negligence in Leaving Snow in Cattle Guard—Reasonable Time for Removal—Question for Jury—Instruction.

1. The statutory duty of a railroad company to maintain suitable and sufficient cattle guards to prevent stock from getting on its track is not complied with when, for an unreasonable time, it permits its guards to remain filled up with snow, ice or any other substance which destroys their usefulness.

2. In the case presented it is *held*: That an instruction touching the liability of the defendant for permitting snow and ice to remain in the cattle guard fairly presented the law to the jury, and that the question whether a reasonable time had elapsed for the removal of the snow and ice, was for the jury.

[Opinion filed November 20, 1886.]

I., B. & W. Ry. Co. v. Drum.

APPEAL from the Circuit Court of McLean County; the Hon. O. T. REEVES, Judge, presiding.

Mr. FRANK Y. HAMILTON, for appellant.

If the fences and cattle guards are sufficient to turn ordinary stock, having been properly constructed and maintained, the company is not liable for the stock that gets over the same and is killed, unless negligently or wilfully done. R. S. Ch. 114, Sec. 48; C., B. Q. R. R. Co. v. Magee, 60 Ill. 529; L., P. & B. R. R. Co. v. Caldwell, 38 Ill. 280; C. & N. W. R. R. Co. v. Hart, 13 Ill. App. 186; C., B. & Q. R. R. Co. v. Farrelly, 3 Ill. App. 60.

The company is not guilty of negligence in permitting its cattle guards to fill up with snow and ice. P. & R. I. R. R. Co. v. McClenahan, 74 Ill. 435; Hance v. C. & S. R. R. Co., 26 N. Y. 428; Blais v. M. & St. L. R. R. Co., 24 N. W. Rep. 558; City of Chicago v. O'Brien, 111 Ill. 232.

Messrs. TIPTON & BEAVER, for appellee.

CONGER, J. This was an action brought against the railroad company for killing a colt which broke out of a field, got upon the public highway that led across appellant's railroad, and from thence crossed a cattle guard so filled and covered up, at the time, with snow and ice, as to offer no obstruction to its passage onto appellant's right of way, and was there killed by the cars of appellant.

The controversy arises over the following instruction: "The court instructs the jury that if they believe, from the evidence in this case, that the plaintiff was the owner of the colt in controversy and that the colt passed in and over on the right of way of defendant's railroad over a cattle guard, and that the cattle guard, at the time the colt passed over the same, was covered with snow and ice so that stock could readily pass over the same, and that the cattle guard had been in the same condition a sufficient length of time for the defendant to have known it and removed the snow and ice from the same before

the colt passed over the same, and that whilst the colt was so on defendant's right of way it was killed by defendant's locomotive, as alleged in the declaration, then the jury will find for the plaintiff and assess the plaintiff's damages at the value of the colt at the time the same was killed, and also to this sum the plaintiff is entitled to recover a reasonable attorney's fee for the services of his attorneys in this case."

We see no objection to this instruction. The language of the law is: "That every railroad corporation shall also construct, and thereafter maintain at all road crossings * * * cattle guards suitable and sufficient to prevent cattle, horses, sheep, hogs and other stock from getting on such railroad."

This duty is not complied with when the company permits the guards to remain filled up with snow, ice or any other substance which destroys their usefulness for the purpose for which they are constructed, viz: to prevent cattle from crossing them and thereby getting on the railroad.

The law is not so unreasonable, however, as to hold a railroad liable for the consequences of storms until a reasonable time has elapsed thereafter to remove the snow and ice accumulating in the guards. We hold, however, that it is the duty of railroads to use reasonable diligence to make their cattle guards answer the purpose of their construction as well in the winter as at other seasons, and if they fail in doing so, they are liable.

In *Dunnigan v. C. & N. W. R. W. Co.*, 18 Wis. 28, it is said: "When a railroad company permits its cattle guards to remain filled with snow, so that cattle which have gotten upon the highway without any negligence upon the part of the owner, pass over the guards and in consequence of being thus upon the track are injured by a train, the company is liable."

The evidence in this case showed that this guard had been allowed to remain filled up with snow and ice for weeks, and it was a question for the jury to determine whether sufficient time had elapsed after the storms for its removal, or in other words, whether the railroad company had used reasonable diligence.

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The instruction, we think, fairly presented this view of the law to the jury, and we see nothing in the evidence requiring us to say that their conclusion was not supported by it.

Affirmed.

CITY OF SPRINGFIELD)

V.

MARY A. SEIGLAR.

Defective Sidewalk—Personal Injury—Action to Recover Damages—Verdict Sustained—Instructions.

Where there is sufficient evidence, if believed, to support the verdict, this court will not interfere.

[Opinion filed November 20, 1886.]

APPEAL from the Circuit Court of Sangamon County; the Hon. JAMES A. CREIGHTON, Judge, presiding.

Messrs. JOSEPH M. GROUT and GREENE, BURNETT & HUMPHREY, for appellant.

Messrs. PATTON & HAMILTON, for appellee.

Per Curiam. This was an action for personal injury by means of alleged defect in sidewalk. Plaintiff recovered below \$200. She could not have received the injury complained of at the place mentioned after the walk was renewed, as shown. But the time of its renewal was not definitely fixed. It was not impossible, according to the evidence, that it was after the injury to plaintiff, and it is not denied that such a defect as was described, at about the place described, had existed for a long time before the renewal.

The jury must have believed the plaintiff and her daughter as to the fact and place of the accident. No sufficient reason appears for overruling their judgment as to the credibility of

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the witnesses. Nor do we think the instructions given for plaintiff assumed any fact that was in question and to be proved.

Judgment affirmed.

INDIANA, BLOOMINGTON & WESTERN RAILWAY COM-
PANY
V.
ENO HINSHAW.

Practice—Conflict of Evidence.

Where the record presents only questions of fact arising upon a conflict of evidence, this court will not interfere.

[Opinion filed November 20, 1886.]

APPEAL from the County Court of McLean County ; the
HON. R. M. BENJAMIN, Judge, presiding.

Mr. FRANK M. HAMILTON, for appellant.

Mr. W. B. CARLOCK, for appellee.

Per Curiam. Appellee recovered judgment for \$40, as damages for the loss of a cow killed on appellant's road. We find in the record only questions of fact arising upon a conflict of evidence, and therefore can not interfere.

Affirmed.

C. & E. I. R. R. Co. v. Boggess.

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY
V.
JOHN BOGGESS.

Railroads—Action to Recover Damages for Killing Colt—Instructions—Evidence.

In an action to recover damages for the loss of a colt, alleged to have been killed through the negligence of the servants of the defendant company, it is *held*: That the questions of negligence were fairly submitted to the jury; that certain instructions asked were properly refused, because they presented the old rule of contributory negligence, and permitted no comparison, and that the verdict is supported by the evidence.

[Opinion filed November 20, 1886.]

APPEAL from the Circuit Court of Vermilion County; the Hon. J. W. WILKIN, Judge, presiding.

Mr. WILLIAM ARMSTRONG, for appellant.

Mr. F. BOOKWALTER, for appellee.

Per Curiam. This was an action commenced before a Justice of the Peace, by appellee, for damages for the loss of a colt alleged to have been killed on appellant's track, through negligence of its servants. On appeal plaintiff recovered judgment on a verdict for \$80. He claimed that the colt got upon defendant's right of way through its negligence in allowing the cattle guards to remain for a long time filled up with and obscured by snow, and that as the train approached no danger signal was given. The questions of negligence and its effect were fairly submitted to the jury; no substantial objections to instructions given are urged. Some were refused, and rightly, because they presented the old rule of contributory negligence and permitted no comparison. There was evidence to support the finding.

Judgment affirmed.

Hawes v. Trustees of Illinois Wesleyan University.

MARK D. HAWES

V.

TRUSTEES OF THE ILLINOIS WESLEYAN UNIVERSITY.

Negotiable Paper—Notes—Subscription to Educational Institution—Condition—Parol Evidence.

In an action by an educational institution on notes made as subscriptions on a proposition to raise \$25,000, in sums of \$100 and upward, the entire amount to be subscribed before any subscription should become binding, said subscriptions having been made at a time when said institution was engaged in raising a similar fund in sums of \$500 and upward, it is *he'd*: That the acceptance, on account of said proposition, of a subscription of \$5,000, constitutes no defense, said second sum of \$25,000 having been raised without said subscription, and that parol evidence is admissible to show that the aggregate amount named in the condition of the notes has been actually obtained.

[Opinion filed November 20, 1886.]

APPEAL from the Circuit Court of Morgan County; the Hon. CYRUS EPLER, Judge, presiding.

Messrs. MORRISON & WHITLOCK and BECKWITH, BROWN & KIRBY, for appellant.

Messrs. H. G. REEVES and BETCHAM & HATFIELD, for appellee.

PLEASANTS, P. J. By way of subscription to a building fund of the university, appellant made to appellees two notes for \$100 each; one providing that it should not be binding until the full amount should be subscribed on a proposition to raise \$25,000 in sums of \$100 or upward, and the other, of later date, being for the 94th \$100 of the \$10,000 then required to make up that amount.

On these notes this suit was brought. Pleas of the general issue and set-off were filed, and upon trial by the court a judg-

HAWES v. Trustees of Illinois Wesleyan University.

ment was rendered on the findings for plaintiffs for \$236 after crediting a payment on account of \$88.

The defense urged was that the full amount had not been obtained as required by the condition in the first note.

Dr. Munsell, who, as financial agent of the university, took an active part in raising it and had charge of it, testified that before this suit was brought he closed up his agency, made a full report to the trustees and turned over to his successor everything in his hands pertaining to it; that he then knew the exact amount that had been obtained, but could not now state it without referring to his report; that his recollection was entirely clear, however, that it was between twenty-six and twenty-seven thousand dollars, that it all came to his hands, and that nearly all of the subscriptions had been paid and the contemplated building erected. None of these statements were contradicted.

But this total included a certain subscription of \$5,000, and appellant claims it should be counted on another proposition, which was, to raise a further sum of \$25,000 in subscriptions of \$500 and upward. Dr. Munsell testified that this further amount had also been fully raised, in such subscriptions, without the one in question, and this was not contradicted. There is nothing substantial in the point.

It is urged that as these papers were not produced, nor any foundation laid for secondary evidence respecting them, this testimony was incompetent under the rule against parol proof of the contents of written instruments.

It appears that the greater part of them—enough, with the receipts in like sums to make up the required aggregate—had been surrendered to their respective makers on payment. They were not produced on the trial, nor further accounted for or proved. But we do not understand there was any occasion or attempt to prove their contents, or need to produce them. The fact that papers of the kind and aggregate amount mentioned in the condition of the note had been actually obtained was properly provable by parol, just as it would have been if the papers had been described as bank notes of a *minimum* denomination. The names, dates and amounts were fully shown

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in the report. If its admission was error, which under the circumstances is not clear, it did no harm, since no other judgment than was rendered could properly have been rendered, if it had not been admitted. There seems to be no merit in the defense.

Judgment affirmed.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY
V.
C. J. OWEN.

Railroads—Injuries to a Calf while in Transportation—Vicious Disposition—Review of Evidence—Negligence—How Determined.

1. Whether a given act is negligent or improper is to be determined by the surroundings and conditions existing at the time, and which were, or ought to have been, known to the party sought to be charged.

2. In an action against the appellant, as a common carrier, to recover damages for injuries to a calf alleged to have been sustained while in transportation through the negligence of the defendant's servants, it is *held*: That the verdict in favor of the plaintiff is not supported by the evidence; that the calf was properly unloaded at the depot instead of at the stock pen; that, from the evidence presented, the injury resulted from the calf's vicious disposition, unprovoked by any misconduct by the defendant or its servants, and that an instruction limiting the exceptions to the defendant's liability to the act of God and the public enemy, was erroneous.

[Opinion filed November 20, 1886.]

APPEAL from the Circuit Court of Adams County; the Hon. WILLIAM MARSH, Judge, presiding.

Messrs. J. F. CARROTT and O. F. PRICE, for appellant.

The law has introduced an exception in favor of the carrier of live stock, of unaccountability for its loss or injury resulting from its own uncontrollable vicious propensities, and damages

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incident to its carriage from its inherent natural character. Angell on Carriers, Sec. 214; Hutchinson on Carriers, Sec. 222; Whart. on Negl., Sec. 615; Cragin v. N. Y. Cent. R. R. Co., 51 N. Y. 61; Smith v. N. H., etc., R. R. Co., 12 Allen, 531; W., St. L. & P. R. R. Co. v. McCasland, 11 Ill. App. 491; C., R. I. & P. R. R. Co. v. Harmon, 12 Ill. App. 54; I. C. R. R. Co. v. Brelsford, 13 Ill. App. 251.

There was no instruction in this case on behalf of the defendant, which stated that the defendant, under law, was not an insurer of the safety and delivery of live stock placed in its charge for transportation; and even if there had been, the second instruction given for plaintiff would still have been misleading and erroneous, as a correct instruction given for one side will not obviate an error in an instruction on the other side. C., B. & Q. R. R. Co. v. Payne, 49 Ill. 496; Adams v. Smith, 58 Ill. 417; Baldwin v. Killian, 63 Ill. 550; Quinn v. Donovan, 85 Ill. 194; Illinois Linen Co. v. Hough, 91 Ill. 63; W., St. L. & P. R. R. Co. v. Schacklet, 105 Ill. 364.

Messrs. BONNEY & WOODS, for appellee.

A verdict will not be set aside where the evidence is conflicting, even though it may be against the weight of the evidence. Morgan v. Ryerson, 20 Ill. 343; Millikin v. Taylor, 53 Ill. 509.

Where the evidence is conflicting and the circumstances tend to support the verdict, it will not be disturbed. Gill v. Crosby, 63 Ill. 190.

Where the evidence is conflicting, and that produced by either party, considered alone, is sufficient to require a verdict in his favor, a new trial will not be granted on the ground that the verdict is not sustained by the evidence. Lewis v. Lewis, 92 Ill. 237.

Where there is evidence from which the jury could properly find their verdict, it will not be disturbed, though the evidence may, in the opinion of the Supreme Court, justify a different result. T., W. & W. R. R. Co. v. Moore, 77 Ill. 217.

Common carriers are liable for all accidents and injuries

freight may receive, except from the act of God and the public enemy. C., B. & Q. R. R. Co. v. George, 19 Ill. 510; Merchants' Des. Tr. Co. v. Kahn, 76 Ill. 520.

The carrier of cattle is not responsible for injuries resulting from their viciousness of disposition, but the question, what was the cause of the injury, is one of fact for the jury. Hall & Co. v. Renfro, 3 Met. (Ky.) 51.

A delivery or tender of the goods must be at a reasonable time and place, and the manner in which the same are delivered must be reasonable, and these are questions of fact for the jury to determine. 2 Redfield on Railways, 78; Hill v. Humphreys, 5 Watt & S., 123; Segura v. Reed, 3 La. Ann. 695; Gibson v. Culver, 17 Wend. 305; Fisk v. Newton, 1 Denio, 47.

PLEASANTS, P. J. Appellee shipped a Polled Angus bull calf from Abingdon, in Knox County, by appellant's freight train, which left at 6 o'clock A. M., to Camp Point in Adams County, where it arrived at 11 o'clock of the same morning. The animal was tied with a rope some ten feet long attached to a ring in a short leathern halter. It was unloaded from the car on the passing track to the platform at the north end of the depot. Until untied to be so unloaded, it had appeared gentle enough, so far as is known, but then and thenceforth showed an uncommon degree of wildness and viciousness. The brakeman who was taking it out, being unable to hold it, was assisted by others, mostly train hands, and with considerable difficulty got it around to and through the door at the east end into the freight room, which was about twenty-five by forty-five feet in area. When those who had been assisting, apparently supposing the struggle was over, let go their hold of the rope and turned to withdraw, it suddenly attacked and butted them in turn with such fury that the whole party escaped by one way or another as quickly as they could, leaving it alone and unfastened. They immediately re-assembled in the office, west of and adjoining the freight room. The door between them was opened a little way and as the calf came to or was passing near it some one, reaching out, caught the rope and drew it in.

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While Mr. Sweet, the engineer of the train, was holding it with one hand and the other stretched out to or toward the animal's head, appellee came up and took hold of it also, but in a moment or so the calf jerked away, ran across to and against the east door, which was then also a little open, and by a second rush threw it off its bearings and escaped. It ran up along the railroad track three quarters of a mile and broke through a board fence into a pasture. The station agent immediately sent two men on horses to recapture it. They found it standing in mud and water, knee deep, with other cattle, and were unable by reason of its viciousness to drive it alone. When they attempted to do so it attacked them, on foot and on horseback. Finally by driving others with it they succeeded in getting it back to the station and into the stock pen. Then, after it had broken one rope with which it was tied to a post, appellee secured it with two others, and with the assistance of two men got it to his place, nearly a mile away, where on arrival it laid down and within an hour died.

There was no external mark of injury upon it and appellee and his witnesses suppose its death was caused by overheating from rage and violent action. No other evidence on that point was offered. The calf was six months old, and of extraordinary size and strength for its age, its weight being six hundred pounds or more. Appellee and his vendor testified it was worth \$450.

This suit was brought upon the implied contract of appellants, as a common carrier, to safely transport and deliver it. The plea was the general issue, and the verdict was for the plaintiff for \$450, on which the court, after refusing a new trial, entered judgment.

We think this verdict should have been set aside as being unsupported by the evidence. From the declaration and the testimony we should be at a loss to conjecture the particular breach of contract or act of negligence on which the plaintiff relied for a recovery. The argument alone discloses them. They are limited to the place at which the calf was unloaded, the teasing to which it is said to have been subjected, and the leaving the east door of the freight room partly open.

It would be useless to discuss the evidence at length; the conclusions to which we are irresistibly drawn will be briefly stated.

First. It was usual to unload a single head of live stock at the depot, and not at the stock pen, which was 300 feet east and north of it and upon another track. The plaintiff must be presumed to have known this, and assented in this instance, as he was expecting the calf by this train and had made no request on that subject. The north platform was very nearly on a level with the car floor. If the calf could have been tied in the freight room it would have been in as safe a place for it and as convenient for the plaintiff as the stock pen. Before it was unloaded there was no reason to suppose it could not be so tied.

Whether a given act is negligent or improper is to be determined by the surroundings and conditions existing at the time and which were or ought to have been known to the party sought to be charged. It is easy to see, after a calf has broken an apparently suitable rope, that it might have been secured by a log chain, but that does not tend to prove the use of the rope was improper.

Second. The number of persons engaged in getting the calf into the freight room was necessary, and made so by its disposition and action. Plaintiff's witness who so assisted, and was not an employe of the defendant, says "it was about all they wanted to do;" and another that "it took their united strength to hold him." There is no contradiction of this, nor any particle of evidence that in this operation they at all abused him in respect to either his body or his temper.

When they left the freight room the east door was completely closed, though not fastened, as it ought not to have been, since occasion for entering it was constantly recurring. It was a safe-guard, as closed, being a sound and heavy freight door, resting on rollers upon a track. While the calf was being held at the west or office door, Mr. Harris, who was not in the employ of the company, came in at the east and left it open, as he says, about three inches. The calf, after jerking away from Sweet and the plaintiff, ran directly at Harris and then shied

to the door, striking it heavily with his head and shoulder, and by a second rush threw it far enough off its bearings to "squeeze through." His escape should be charged not to any defect in the door, nor to the line of light through the three inch opening, but to his own furious wildness, which the company's agents had no reason to anticipate.

But the point most confidently presented for plaintiff is founded upon his statement that when he came up to take hold of the rope, at the office door, Sweet was holding it with one hand and "punching" at the calf, "this way," while it was "butting up at the door at him;" that they were just having a good time," and that he then "told Sweet not to tease it in that way." Just how he described by imitation the action which he described in terms, as "punching," is not shown, but no other witness appears to have suspected that he was intending to tease it. Mr. Sweet, himself, swears he was trying "to pet and pacify it." His action, so far as disclosed, was no less consistent with that purpose than with the one suspected by plaintiff, and as such was proper and natural—for who ever held a vicious, wild or frightened animal and did not try, if he safely could, to stroke his head? To tease it was forbidden by his duty, and such a purpose is not to be presumed.

The manner in which defendant's witnesses related the circumstances of their overthrow and chase by this active, vigorous and mad young bull, is largely commented on as throwing a light upon their real aims and actions, which it is lamented this court can not have.

A situation altogether serious in experience may be unavoidably comical in narration. We have been amused at the scene as presented in words on cold paper, and can readily understand how the account, as given on the witness stand, must have appeared ludicrous even to the victims who were giving it, although they were sober-minded men, intent on business and duty only at the time of the occurrence, but can not regard that fact as a circumstance tending to impeach their claim, made on oath, to have acted in good faith.

The recapture of the calf and the means employed for that purpose were according to the request of the plaintiff. He does not complain of anything in that connection.

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It is shown that no mark of violence or injury appeared upon its body. It received no hurt directly from its transportation or delivery, but came to its death by overaction and overheating from its own disposition, unprovoked by any misconduct of the defendant or its servants.

For injuries resulting from such a cause the carrier is not liable. The second instruction limiting the exceptions to the act of God and of the public enemy, is conceded to be wrong in itself, and we doubt if it was cured by the third, which, it is said, included under the first of these exceptions the natural temper and disposition of the calf.

For these reasons the judgment will be reversed and the cause remanded.

Reversed and remanded.

JOHN ROSE

V.

FLORA E. VANDERCAR, ADMINISTRATRIX.

Action on Lost Note—Instructions—Errors—Extent of Search Required—Original Consideration—Question for Jury.

In an action on a lost note, alleged to have been made by the defendant's intestate, the only issue of fact being as to its genuineness, it is *held*: That many of the instructions, which were too numerous, were erroneous; that the holder was not required to make diligent search for the note "wherever it might be found;" that it was error to assume that the plaintiff "knowingly introduced to the jury false and fabricated testimony;" that the jury were improperly authorized to disregard the evidence of certain witnesses; that the suit was not for the original consideration; that it was for the jury to determine the weight of the evidence as to the genuineness of the note, and that it was error to instruct the jury that, in the absence of evidence as to what the consideration was, they might refuse to find the note genuine from evidence of handwriting alone.

[Opinion filed November 20, 1886.]

APPEAL from the Circuit Court of Fulton County; the Hon. JOHN C. BAGBY, Judge, presiding.

Rose v. Vandercar.

MESSRS. BARRERE & GRANT, C. G. WHITNEY and C. F. ROBINSON, for appellant.

MESSRS. GRAY & WAGGONER, W. S. EDWARDS and W. H. BARNES, for appellee.

PLEASANTS, P.J. This was assumpsit by appellant against appellee. The declaration contained a special count on a note alleged to have been made by the deceased to plaintiff, and the common counts. Plea, the general issue sworn to. Verdict for defendant, new trial refused and judgment entered.

The only issue of fact was upon the genuineness of the note. It was claimed to have been lost, and upon proof thereof to the satisfaction of the court, secondary evidence of its contents was received. Witnesses who had seen it, and who claimed to have had the legal means of knowing and to know the deceased's handwriting, differed in opinion as to the genuineness of the signature, and there were circumstances in proof tending to corroborate each. We have nothing to say as to the weight of the evidence, but must reverse the judgment for errors in the instructions given for defendant.

These instructions were needlessly and therefore dangerously numerous, considering the singleness of the issue. In the abstract they are not numbered, but judging from the paragraphs and subject-matter there were twenty-three exclusive of that relating to the form of the verdict. The first assumes that there is evidence, which does not appear, impeaching the good faith and diligence of plaintiff's search for the note, and the seventeenth holds him bound to show that immediately after he claims to have lost it he instituted diligent search for it "wherever it might be found"—a rule which would reach an unknown thief's pocket. The eighteenth assumes the production of evidence tending to show that plaintiff "knowingly introduced to the jury false and fabricated testimony"—which counsel contend, but fail to convince us, was warranted by proof tending to show that his son in fact testified falsely. The jury are authorized to disregard entirely, except so far as it may be duly corroborated, the testimony of some new classes

of witnesses: as those who are said to have been successfully impeached "by proof of having made different statements at other times" (No. 10); who have testified to any material fact that they did not swear to when witnesses on a former trial of the same cause and whose late statement of it is false, fabricated or untrue (No. 21); or who are shown to be persons "of bad reputation for truth and veracity in the neighborhood where they reside" (No. 13). It is to be presumed that court and counsel well understood that the generality of such reputation and the wilfulness of such misstatements are material elements in these cases respectively and that they were omitted through haste and inadvertence.

The 7th is "that a promissory note is only evidence of an existing indebtedness from the maker to the payee, and that in case of the loss of a note a party may sue and recover for the original consideration of the note, in a suit brought for that purpose." This suit was not for the original consideration, but distinctly upon the note. It would have been improper for the plaintiff to offer evidence in chief upon the issues made on the original consideration. The instruction was therefore irrelevant, yet may have suggested to a jury that as against an administrator he ought to prove the consideration, and that no injustice would be done him if he were remitted to the suit referred to in it. If it had been intended and proper to say that although positive proof of a want of consideration would be wholly unavailing in case the genuineness of the note were shown, yet such proofs, if made, might be considered in connection with other evidence as tending to show it was not genuine, this was not a proper way to say it. The 16th is to the same effect. Further use of the same idea was improperly made, for in the 22d it is said that, to prove its genuineness, it was competent for the plaintiff to prove what it was given for, and that if no such proof has been offered, but only the opinion of witnesses as to the handwriting of the deceased, the jury "may disregard such evidence and refuse to find the note to be genuine from that evidence alone, if they find the same to be weak, unsatisfactory and not convincing," and then the 23d and last told them as

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matter of law that without proof of consideration such evidence was weak, unsatisfactory and not convincing—the language being “that such evidence is of a character little worthy of credence, and in the absence of evidence as to what the alleged note was given for, the jury may refuse to find the alleged note to be genuine from such evidence of handwriting alone.”

It can hardly be necessary to cite authority to show that this was a clear invasion of the province of the jury. There was nothing in the conduct or position of the witnesses, as set forth in these instructions or in the nature of their testimony, that would authorize the jury to disregard it. They were not bound to believe it, but were bound to consider it, and upon its consideration to determine for themselves whether it was fit to be believed. The error of the court in thus discrediting it was so serious as to entitle the plaintiff to a new trial, even if we were of opinion that the verdict was right. The judgment will, therefore, be reversed and the cause remanded.

Reversed and remanded.

P. Q. HARRISON

V.

ANN HART AND FRANCIS HART, EXECUTORS, ETC.

Scire Facias to make Third Person Party to a Judgment—Pleading—Defenses—Former Judgment—Contradiction of False Return—Review of Authorities.

1. Upon *scire facias* to make a third person a party to a judgment, rendered upon a former judgment of the same court against him and the defendant in the last judgment, it is *held*: That every good defense must be a defense against the former judgment and not against the note or account on which it was founded; that the defenses, *non assumpsit*, *non est factum* and *nil debit*, were irrelevant, even if the plea setting them up was not bad for duplicity; and that a rejoinder to a replication averring that the record of the judgment and return showed personal service, which avers that said return is false, is insufficient at law.

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2. Where an officer's return, appearing in the record of a former adjudication, shows an actual personal service, it can not be contradicted in a collateral proceeding at law by evidence *dehors* the record.

[Opinion filed December 1, 1886.]

APPEAL from the Circuit Court of Morgan County; the Hon. CYRUS EPLER, Judge, presiding.

Messrs. BROWN & KIRBY, for appellant.

The real question presented by this record is whether a party defendant can be permitted to contradict the return of the Sheriff or whether he must submit to a judgment and take his chances for indemnity in an action against the Sheriff for a false return.

As between the original parties and their representatives, an officer's return is but *prima facie* evidence of its truth, and may be contradicted. *Sibert v. Thorp*, 77 Ill. 43; *Owens v. Ranstead*, 22 Ill. 161; *Brown v. Brown*, 59 Ill. 315; *Hickey v. Stone*, 60 Ill. 458; *Ryan v. Lander*, 89 Ill. 554; *Union Nat. Bank v. First Nat. Bank*, 90 Ill. 56; *Chicago Electric Co. v. Congdon Brake Co.* 111 Ill. 309.

A similar rule has been announced in the States of Connecticut and Wisconsin. *Watson v. Watson*, 6 Conn. 334; *Case v. Bank*, 16 Wis. 52.

The English rule that the return of the Sheriff can not be contradicted has been relaxed in this country. *Ryan v. Lander*, 89 Ill. 554.

To deny a person the right to contradict the return is the equivalent of saying that the judgment may be rendered by a court against a person without notice and without jurisdiction of his person.

If a sale had taken place under the original judgment, and a stranger had purchased upon the faith of the record, we will admit that at law the appellant could not question the return, as against the innocent purchaser, but would at law be remitted to his action against the officer for a false return.

Mr. JOHN A. BELLATTI, for appellees.

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The cases wherein the Supreme Court have held that the return of the Sheriff is only "*prima facie* evidence of the facts therein stated, and may be put in issue by plea in abatement before judgment," are cases where the court have not yet passed upon the return, and found that it had jurisdiction, and the return was therefore only the testimony on oath of the officer, and to hold that it might be contradicted was certainly right. But in this case, the return of the officer has attained to the dignity of the record of the Circuit Court; that is to say, the Circuit Court found that the party had been duly served with process and that the court had jurisdiction of his person, and thereupon rendered judgment against him, and the summons and the return thereupon became a part of the record of that judgment, and can not be contradicted. *Hunter v. Stoneburner*, 92 Ill. 75; *Barnett v. Wolf*, 70 Ill. 76; *Zepp v. Hagar*, 70 Ill. 223; *Harris v. Lester*, 80 Ill. 307; *Welch v. Sykes*, 3 Gilm. 197; *Bimeler v. Dawson*, 4 Scam. 536; *Hall v. Williams*, 6 Pick. 232.

The above cases established the rule: "That if the record shows affirmatively that the defendant was personally served with process, it furnishes conclusive evidence of that fact, and the defendant can not controvert it."

PLEASANTS, P. J. This was a *sci. fa.* to make appellant party to a judgment of the Circuit Court of Morgan County rendered at the May term, 1881, in favor of the testator of appellees, against Benjamin Berry, who was impleaded with him, appellant not being found.

He filed two pleas. The first averred that said judgment was rendered upon a former judgment of the same court, rendered November 22, 1872, in favor of the same plaintiff against said Berry and this defendant, for \$610.25 damages, \$7.85 costs, and that in said case the court did not have any jurisdiction of the person of this defendant; that no process of summons was ever served in said cause upon him, and he did not in any way submit himself to the jurisdiction of said court, and it did not have any jurisdiction to render said judgment against him.

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The second avers that said first judgment was rendered in an action of assumpsit brought upon a promissory note, alleged to have been executed by said Berry and this defendant to said Matthew Hart, and that this defendant did not undertake and promise as alleged in the declaration therein; that he did not make and deliver the promissory note therein described; that said note was not his act; that he did not owe and was not indebted to said Hart as was alleged in said declaration in any sum, either upon said note or any other cause of action whatever. It also avers that the court did not have jurisdiction of the person of this defendant; that he was not served with process and did not appear nor in any other way, manner or form submit himself to the jurisdiction of said court whereby it could or did have jurisdiction to render said judgment against him.

To this second plea the plaintiffs interposed a special demurrer for duplicity, which was sustained.

To the first they filed a replication that the record of the proceedings and of the judgment rendered November 22, 1872, in said cause, now remains in this, the said Circuit Court of Morgan County, and that the said record shows that said court in said cause did have jurisdiction of the person of said defendant Harrison, and shows personal service of process therein upon him.

Defendant rejoined that the summons in said cause was not served upon him by reading or otherwise, and that the return of said summons wherein it appears that the same was served upon him, was and is untrue and false.

A demurrer to this rejoinder was sustained, and the defendant abiding, judgment was entered, making him party to the judgment of May term, 1881, in the usual form, and he appealed.

The errors assigned are that the court sustained these demurrers and rendered the judgment it did. Since the decisive question in the case arises upon the demurrer to appellant's rejoinder, we have not anxiously considered the objection to the second plea. At first blush it would seem to be very badly affected with duplicity, for it sets up, first—a com-

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plete defense to the judgment in the original suit on which the last was brought, that the court had no jurisdiction of the defendant's person, and then several defenses to the causes of action on which it might have been rendered—*non assumpsit*, *non est factum* and *nil debet*. But perhaps upon further reflection the fault may be found to be superfluity only. The judgment to which it was here sought to make the defendant a party was rendered in an action of debt upon a former judgment alone. Whatever were the causes of action under the special or common counts of the declaration in the original case, were treated as merged in the judgment. Every good defense must therefore be a defense against that judgment and not against the note or account on which it was founded, and hence these defenses, *non assumpsit*, *non est factum* and *nil debet*, being applicable only to the causes of action which, according to the declaration in the second suit, had become merged in that judgment, were irrelevant in an action upon the judgment alone. Treating them, then, as surplusage, the plea was but a duplicate of the first, that the judgment was void for want of jurisdiction of the defendant's person, and the replication to the first was in substance an answer to both. Was it met by a sufficient rejoinder?

That an averment against the record in a collateral proceeding at law is inadmissible, is well understood. But it is claimed that an officer's return of process is not such a record as is conclusive under the rule, but is only *prima facie* proof of the facts therein stated, according to the tendency and scope of modern authorities. At common law it was conclusive, and the only remedy for a false return was an action for damages against the officer. But it is true that under the practice prevailing generally in the United States, by which service is allowed to be made, and with like effect as if actually personal, by leaving a copy at the usual place of defendant's residence with a member of his family over a specified age, and the officer is to be the judge of these facts, the reason which supported this rule in England is materially weakened, as is well shown in *Bond v. Wilson*, 8 Kan. 228. The rule itself has therefore been relaxed in several cases by

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the courts of the different States so that, as here applied, it is by no means uniform. Our own Supreme Court has had frequent occasion to consider the subject, and we deem it unnecessary to look beyond its decisions for a solution of the present question.

From these it appears that because in many cases the remedy for a false return by action against the officer is inadequate, equity will relieve against a judgment entered upon it. *Owens v. Ranstead*, 22 Ill. 161; *Hickey v. Stone*, 60 Ill. 458.

So also it will set aside a default entered upon such return, on motion promptly made and sufficiently supported by affidavits. *Brown v. Brown*, 59 Ill. 315.

And at law an officer's return of service is not *per se* such a record as imports absolute verity, but is so far only *prima facie* evidence of the matters therein recited that it may be put in issue before judgment, by plea in abatement verified by affidavit and interposed at the earliest opportunity. *Mineral Point R. R. Co. v. Keep*, 22 Ill. 9; *Holloway v. Freeman*, 22 Ill. 197; *Sibert v. Thorp*, 77 Ill. 43; *Ryan v. Lander*, 89 Ill. 554; *Chicago National Bank v. First National Bank*, 90 Ill. 56; *Chicago Electric Co. v. Congdon Brake Co.*, 111 Ill. 309.

It is further held that where the return or finding in the record of a court of general jurisdiction of a sister State, which, under the Federal Constitution, stands on the footing of a domestic judgment, shows that the service was not actually personal, but by leaving a copy at his residence etc., it is only *prima facie* proof of jurisdiction of the person, and therefore may be contradicted and overcome. *Bimeler v. Dawson*, 4 Scam. 536; *Welch v. Sykes*, 3 Gilm. 197.

But where the return or finding shows an actually personal service or appearance, the holding seems to have been constant that it can not be contradicted by evidence *dehors* the record. It was so held in *Rust v. Frothingham*, Breese, 258 (Beecher's Ed. 331), in the last two cases above cited, and in *Barnet v. Wolf*, 70 Ill. 76; *Zepp v. Hager*, 70 Ill. 223; *Harris v. Lester*, 80 Ill. 307; *Hunter v. Stoneburner*, 92 Ill. 75.

In the case at bar, as has been seen, the replication averred that the record of the judgment and the return showed per-

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sonal service of the process upon the defendant. The rejoinder admits they do, but avers they are not true.

Upon the authorities above cited we are of opinion that this was insufficient at law and therefore that the demurrer was properly sustained.

Judgment affirmed.

THOMAS H. JOHNSTON

V.

ANTHONY G. WILLEY.

Exemptions—¶ 14, Ch. 52, Starr & C. Ill. Stat. (Act of 1877)—*Schedule—Refusal to Make—Subsequent Compliance—Reasonable Time—Question for Jury.*

1. The positive refusal by the owner of personal property to make a schedule at the time of the levy under execution, upon due notice and opportunity given, does not of itself prevent or estop him from making such schedule within a reasonable time thereafter.

2. What is a reasonable time for making and delivering the schedule depends upon the special circumstances of each case, and is a question for the jury. In some cases it should be before levy. In others it will be in time if before sale.

3. In the case presented no question of fraud arises. The owner's refusal was in ignorance of his duty and without intention to waive his claim. He made and delivered the schedule within a few hours, and as soon as he could get legal advice. Whether the time was reasonable was a question for the jury.

[Opinion filed December 1, 1886.]

APPEAL from the Circuit Court of Christian County.

Messrs. PROVINE & McBRIDE, for appellant.

Mr. FRANK DRENNEN, for appellee.

PLEASANTS, P. J. Appellee got judgment in replevin for a

span of mules, against appellant who, as a Constable, had taken them under writs of execution against him.

He was a married man, residing with his family. The Sheriff, holding another execution, had set off to him \$400 worth of his effects, including these mules, under the provisions of Sec. 2 of the Act approved May 24, 1877. Appellant came in when the Sheriff was taking a list of the property, and after it was completed informed appellee of the writs in his hands and asked what he could do for him, to which appellee replied that he could do nothing, as the Sheriff had levied on all his property. Two days afterward appellant again saw him and insisted that he should turn out property or make a schedule. Appellee said he didn't know that he needed to make a schedule as he had got his set-off, and that was all he wanted. Appellant insisted that he also must have a schedule or he would make a levy. Appellee told him to go ahead and he would replevy; and thereupon appellant immediately took the mules.

In the evening of the same day, after consulting a lawyer appellee made out a schedule and gave it to a friend, who, by his direction, presented it to appellant and demanded the property. Appellant declined to give it up, saying that appellee "had refused to schedule and it was now too late."

We hold that as matter of law it was not necessarily too late, even after a positive refusal, upon due notice and opportunity given, and levy thereupon made.

The statute provides that "whenever"—that is at any time when, no less than in any case in which—a debtor, against whom an execution has issued, may desire to avail himself of its benefits, he may do it by delivering to the officer a proper schedule. Ordinarily this should and would be done before levy, but the only limitation by the statute of the time for its effectual delivery is that which is necessarily implied, viz., that it must be before the writ is executed and the officer's control of the property lost by sale thereunder, and what is generally implied where time is given without a more specific limitation, viz., that it must be within a reasonable time. What is a reasonable time will depend upon the special circumstances, and is a question of fact for the jury. In some cases it should be before levy; in others it will be in time if before sale.

Johnston v. Willey.

Wright v. Deyoe, 86 Ill. 490, and the other cases cited, in which it was held that the debtor must make his claim and selection—if he has reasonable notice and opportunity—before the levy, arose under the former statute, and are believed to be inapplicable to the one now in force. Nor do we find in this act, or other law, or in reason, any warrant for the idea that his right is necessarily and absolutely forfeited by a mere declaration that he will not make a schedule. So long as he refuses or neglects, after due notice and opportunity given, to make it, the officer may lawfully proceed in the execution of his writ; but his proceedings may, under some circumstances, be arrested by the delivery of a proper schedule, at any time before it is completed. It is the actual delivery or non-delivery of the schedule before such time and within a reasonable time that determines his right, and not the promise that he will, or the declaration that he will not deliver it. In either case he may, under some circumstances, be justified in changing his mind.

Upon this question Blair v. Parker, 4 Ill. App. 409, and Chapin v. Hoel, 11 Ill. App. 309, are cited for appellant. Neither is in point. The first was an action for the penalty prescribed for selling exempt property. The debtor had delivered his schedule, with due effect. But there was certain "property owned by him and not included in" it. The statute expressly and affirmatively declares that such property "shall not be exempt." The debtor sought to exempt it, three or four days after it was levied on by a second schedule, and the court held that such a proceeding was not provided for nor allowed by the statute. In the other the plaintiff had bought the property from the execution debtor after the lien attached and when no schedule had been made to exempt it, and the court held that the debtor could not protect property by a schedule made after he had sold it. We know of no authority or reason for holding absolutely that he could not do it after and because of a mere declaration that he would not, even though it were followed by a levy made in consequence of it.

Such a declaration would not operate as an estoppel be-

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cause the levy would be as lawful without as with it, and in no case would it be a ground of authority to sell. The writ alone is the officer's warrant. If, then, a levy which is lawful without the debtor's consent to it would not bar him, it is not perceived how his assent added would necessarily give it that power.

In this case no question of fraud is involved. Appellee's refusal at first was in ignorance of his duty, and in such manner as to rebut any inference that he intended to violate it or waive his claim, and he made it in due form, within only a few hours of his refusal, and as soon as he could get reliable advice in relation to the law. Whether this was or was not, under the circumstances, within a reasonable time, was a question of fact. We think the finding was right, and the judgment will be affirmed.

Judgment affirmed.

JOHN A. RUTLEDGE ET AL.

V.

MARY RUTLEDGE.

Widow's Award—Secs. 74 and 75, Ch. 3, R. S.—Appraisers' Estimate—Specific Articles Possessed by the Estate to be Included—Value of Family Pictures and Wearing Apparel, Jewels and Ornaments, Need not be Estimated—Specific Articles of Special or no Value.

1. In making their estimate of the widow's award, under Secs. 74 and 75, Ch. 3, R. S., the appraisers are required to appraise the articles actually possessed by the estate, which are within the description of Sec. 74.

2. The appraisers are not required to estimate the value of the family pictures and wearing apparel, jewels and ornaments of the widow and her minor children, all of which are included in the award without reference to their value.

3. If the estate has the specific articles which fairly and substantially answer the designation of the statute, they or their value as fixed by the appraisers must be taken.

4. It seems that if the specific articles possessed by the estate are so worthless as to be unfit for ordinary use, or if they have an unusual value for some special use, the appraisers should disregard and ignore them.

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[Opinion filed December 1, 1886.]

IN ERROR to the Circuit Court of DeWitt County; the Hon. G. W. HERDMAN, Judge, presiding.

Mr. GEORGE B. GRAHAM, for plaintiffs in error.

Our statute providing for an allowance to widow was intended to provide for widow and family substantially the amount exempt to heads of families. Rev. Stat. 1874, Sec. 74; Williams v. Hall, 33 Tex. 432; Hardin v. Osburn, 43 Miss. 532; Wally v. Wally, 41 Miss. 657.

When specific articles of property are made exempt by law, such specific articles only can be claimed by the person entitled thereto, and not other property in lieu thereof, unless the act plainly confers such right; and this is true even if the claimant has not the articles specifically exempt. Wygant v. Smith, 2 Lans. 185; Friedlander v. Mahoney, 31 Iowa, 311; Pool v. Reid, 15 Ala. 826; State v. Farmer, 21 Mo. 160; Mahan v. Scruggs, 29 Mo. 282.

When the specific articles to which the widow is entitled are of the estate, it becomes the duty of the appraisers to estimate the value thereof and set them apart to the widow and certify the same to the court. R. S., Chap. 3, Sec. 75; York v. York, 38 Ill. 522; Wally v. Wally, 41 Miss. 657.

At the time of the decision in York v. York the statute did not in terms require, as it now does, the appraisers to set apart the specific articles to the widow.

Messrs. FULLER & MONSON, for defendant in error.

WALL, J. The question presented here is as to the construction of Secs. 74 and 75, Ch. 3, R. S., and arises upon the appraisers' estimate of the widow's award.

The estimate was as follows :

Family pictures and wearing apparel, jewels and ornaments of widow and minor children.....	\$400 00
School books and family library.....	100 00
Sewing machine.....	80 00

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Necessary beds, bedsteads and bedding for widow and family.....	\$500 00
Stoves and pipe used in the family, with necessary cooking utensils.....	50 00
Household and kitchen furniture.....	100 00
One milch cow and calf, being one for every four members of the family.....	75 00
Eight sheep and fleeces, being two for each member of the family	80 00
One horse, saddle and bridle.....	250 00
Provisions for widow and family for one year.....	650 00
Food for stock above specified for six months.....	75 00
Fuel for widow and family for three months.....	40 00
Other property.....	100 00
	<hr/>
	\$2,500 00

This was objected to by the heirs. It appeared that there were of the estate the various articles specified in Sec. 74, with one or two exceptions. For instance there was a sewing machine, necessary beds, bedsteads and bedding, household and kitchen furniture, besides wearing apparel, family library, etc.; but although these were good and sufficient and so regarded by the witnesses, for a man in the circumstances of the deceased, the appraisers did not consider or appraise the value of the articles actually possessed by the estate and answering the description given in Sec. 74, but made an estimate on some imaginary basis of what such articles might be worth; the avowed object as stated by the appraisers being to give the widow such an allowance in gross as they thought she ought to have in view of the magnitude of the estate. The appraisers were asked and, over objection, permitted to answer whether they regarded the aggregate sum of \$2,500 as a reasonable allowance, considering the estate. Other witnesses were asked the same questions, and it is apparent the estimate was based mainly upon this idea—not taking into account the value of the articles answering to the designation of the statute which the estate had.

The estimate of the appraisers was approved by the court and this ruling is assigned as error.

Sec. 74 provides that the widow, residing in this State, of a deceased husband whose estate is administered in this State, whether the husband died testate or intestate, shall in all cases,

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in exclusion of debts, etc., be allowed as her sole and separate property the following :

First. The family pictures and the wearing apparel, jewels and ornament of herself and family.

Second. School books and family library of the value of \$100.

Third. One sewing machine.

Fourth. Necessary beds, bedsteads and bedding for herself and family.

Fifth. The stoves and pipe used in the family with the necessary cooking utensils, or in case they have none, \$50 in money.

Sixth. Household and kitchen furniture of the value of \$100.

Seventh. One milch cow and calf for every four members of the family.

Eighth. Two sheep for each member of the family and the fleeces taken from the same, and one horse, saddle and bridle.

Ninth. Provisions for herself and family one year.

Tenth. Food for the stock above specified, six months.

Eleventh. Fuel for herself and family for three months.

Twelfth. \$100 worth of other property suited to her condition in life, to be selected by the widow.

Which shall be known as the widow's award; or the widow may, if she elect, take and receive in lieu of the foregoing, the same personal property or money in place thereof as is or may be exempt from execution or attachment against the head of a family residing with the same.

Sec. 75 provides : The appraisers shall make out and certify to the County Court an estimate of the value of each of the several items of property allowed to the widow, and it shall be lawful for the widow to elect whether she will take the specific articles set apart to her or take the amount thereof out of other personal property at the appraised value thereof, or whether she will take the amount thereof in money, or she may take a part in property and a part in money as she may prefer; and in all such cases it shall be the duty of the executor or administrator to notify the widow as

soon as the appraisement shall be made, and to set apart to her such article or articles of property, not exceeding the amount to which she may be entitled, as she may prefer or select, within thirty days after written application shall be made for that purpose by such widow.

And if any such executor shall neglect, he shall be punished, etc., etc. When there is not property of the estate of the kinds mentioned in the preceding section the appraisers may award the widow a gross sum in lieu thereof, except for family pictures, jewels and ornaments.

In the case of *York v. York*, 38 Ill. 522, the Supreme Court in considering a similar statute held that the legal title of the specific articles vests in the widow upon the death of the husband, and if she dies before reducing the articles or their value to possession, and before administration is granted on the husband's estate, her administrator may sue for and collect the value of the same from the husband's estate, and say, among other things, that the statute requires only that the appraisers shall make out and certify "an estimate of the value of each article of specific property in order, as we understand, that the administrator may not include them as assets and may have credit for their value on the settlement of his administration with the court."

In *Strawn v. Strawn*, 53 Ill. 263, the court say: "The reasonable intent to be imputed to the Legislature is that it designed the appraisers, in fixing this amount, should take into view the condition and mode of life in which the widow was left by the death of her husband and to regard as necessary that furniture which is the ordinary and appropriate furniture of such homesteads."

The final clause of Sec. 75 is an express recognition of the duty of the appraisers to estimate the specific articles possessed by the estate and not other ideal articles of the same kind. When it says if there is not property of the estate of the kinds mentioned in the preceding section a gross sum in lieu thereof may be awarded it is clear that the converse is intended, and if there are such articles, they or their value must be taken.

We are of opinion the estimate in this case was made upon

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an erroneous basis as to all the specific articles which were possessed by the estate.

The first item in the 74th section is for the family pictures and wearing apparel, jewels and ornaments of the widow and children. As to these no valuation is required. Whatever they may be they go to the widow.

They may be worth much or little, they are hers. This estimate, however, makes an arbitrary allowance of \$400 for this item, regardless of the final clause of Sec. 75, which prohibits a gross allowance therefor.

If the estate has the specific articles which fairly and substantially answer the designation of the statute, they, or their value as fixed by the appraisers, must be taken. Their value is the basis of the allowance. If the widow prefers, she may take their appraised value in other articles or in money, but it is not admissible in such a case, when the estate really has the articles, to value them at a low, or even a fair figure, and then, as the basis of allowance, fix the value of such articles as though not possessed, upon some ideal or imaginary standard, for the purpose of swelling the aggregate allowance, in order to meet the appraisers' view of what the widow ought to have.

If the chattels possessed by the estate are so worthless as to be unfit for ordinary use, the appraisers should disregard and ignore them; and so, if they have unusual value for some special use, as for breeding purposes and the like, it would be proper to treat them as not within the true spirit and intent of the statute.

The law, while it ever has been and should be construed liberally for the benefit of widows and minor children, must be followed and observed. The appraisers can not be permitted to substitute a different rule in any case.

The judgment of the Circuit Court will be reversed and the cause remanded with directions to set aside the estimate.

Reversed and remanded.

CASES
IN THE
APPELLATE COURTS OF ILLINOIS.

FOURTH DISTRICT—AUGUST TERM, 1886.

JOHN M. CROWELL
V.
MACE DEEN AND JULIA A. DEEN.

Judgment for Costs—Minute of Court—Unauthorized Change by Clerk with Entry against Opposite Party—Bill to Amend, set aside Execution and Sale, and Cancel Certificate of Purchase, Sustained—Evidence.

Upon a bill to have the record of a judgment for costs amended, to set aside the execution issued thereon and a sale of real estate thereunder, and to cancel the certificate of purchase issued to the defendant, the purchaser, it is *held*: That the judgment complained of was never in fact pronounced by the court, the clerk having had the judgment entered against the defendants upon his understanding that the minute, "continued at costs of plaintiff," entered upon the docket by the court, was a mistake; that the clerk was without authority to substitute his recollection for the written memorandum of the court, and that the order of the court, if wrong, worked no injury to the plaintiff in the original suit, the final judgment having been against him.

[Opinion filed November 24, 1886.]

APPEAL from the Circuit Court of Johnson County; the Hon. DAVID J. BAKER, Judge, presiding.

Mr. J. F. McCARTNEY, for appellant.

The law nowhere requires the Judge to keep minutes. The law requires the clerk to be present to perform his duties as clerk in time of court. Governor v. Dodd, 81 Ill. 162.

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Officers are presumed to do their duty. The Judge is presumed to pronounce the correct judgment of the law. The clerk is presumed to correctly enter that judgment in the record. There being no obligation of the Judge to make a minute of the pronounced judgment, such presumption does not go to the minute that it is correct.

The record in this case, showing a valid judgment against appellee which became a lien after execution, went into the officer's hands, we are not called on to defend, but the party who denies its validity takes the burden on himself.

Messrs. MULKEY & LEEK, for appellees.

It is well settled that a court will not hesitate to amend a record by the minute of the Judge of the court. When the minutes entered in the Judge's docket, in a given case, are shown to be in the handwriting of the Judge, they are conclusive evidence of the order made in the cause, and can not be contradicted or explained by parol evidence. *Coughran v. Gutcheus*, 18 Ill. 390; *Forquer v. Forquer*, 19 Ill. 68; *McCormick v. Wheeler*, 36 Ill. 114; *Seely v. Pelton*, 63 Ill. 101; *Cairo & St. L. R. R. Co. v. Holbrook*, 72 Ill. 419; *Church v. English*, 81 Ill. 442; *Gillett v. Booth*, 95 Ill. 183.

It is a well settled principle of law that that which rests in writing can not be proved by parol evidence. *Chambers v. The People*, 4 Scam. 351; *Williams v. Jarret*, 1 Gilm. 120; *R., R. I. & St. L. R. R. Co. v. Lynch*, 67 Ill. 149; *Fagan v. Rosier*, 68 Ill. 84; *Walker v. Douglas*, 70 Ill. 445.

It is equally well settled that that which rests in writing can not be contradicted by parol evidence. *Zimmerman v. Zimmerman*, 15 Ill. 84; *Garfield v. Douglass*, 22 Ill. 100; *Hutton v. Arnett*, 51 Ill. 198; *Gibbons v. Bressler*, 61 Ill. 110; *Taft v. Schwamb*, 80 Ill. 289.

The case of *Gillett v. Booth*, 95 Ill. 183, is decisive of the case at bar.

PILLSBURY, J. This was a bill in equity filed by the appellees against the appellant, praying to have the record of a judgment for costs amended and to set aside the execution issued thereon, and to set aside a sale of

real estate made thereunder and cancel the certificate of purchase issued to appellant, who was the purchaser at the sale. Many of the facts out of which the present controversy arises may be said to be admitted, or not disputed, and briefly stated are, that on the 31st day of January, 1878, the appellant commenced an action of replevin against appellees before a Justice of the Peace to recover the possession of a horse, and being successful before the Justice the case was removed into the Circuit Court upon the appeal of the defendants. At the November term of the Circuit Court the parties were present with witnesses ready to try said cause, but the day before it was reached for trial the defendants made an application to have the cause continued on the ground that two members of their family had suddenly died, and being conceded to be sufficient it was understood if the cause should be reached before court adjourned it should go over the term. On the day following the case was reached in its regular order for trial, and the court entered upon his docket the minute of continuance as follows: "Continued at costs of plaintiff," and at same time ordered that defendants file a new appeal bond in the sum of \$80 by the first day of April, 1879. After the adjournment of that term of court and while the clerk of the court was writing up the record he noticed the entry by the court upon its docket that the case was continued at plaintiff's costs, and understanding that it should have been at the defendants' costs he drew pencil marks across the word plaintiff in the order and wrote upon the margin of the Judge's docket the following: "Judgment against Appellant at November Term, 1878, 13, December 1878," and the judgment for costs was written up in accordance with this memorandum of the clerk. At the November term, 1879, of the Circuit Court a trial was had upon the merits in the replevin suit, and final judgment was rendered therein in favor of the defendants, the present appellees, for a return of the property replevied and for costs. On January 25, 1881, an execution was issued against the appellees upon the judgment for costs, entered of record by the clerk as above stated and levied upon two town lots claimed by the appellees as their homestead. A sale was

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made and the appellant became the purchaser. The questions of fact disputed are whether the court announced at the time the motion was made for a continuance, that if it had to go over the term it must be at costs of the defendants, and whether the property levied upon was the homestead of appellant. The court decreed as prayed, and the defendant below appealed. After a careful examination of the evidence contained in this record we have come to the conclusion that it sustains the finding of the court below, that the judgment entered of record by the clerk was never in fact pronounced by the court in the replevin suit. If the oral testimony is to be considered as competent to show what the judgment was as to payment of costs it is sufficient to justify the decree. The Judge who entered the order for the continuance testifies that he intended to continue generally, and he is very strongly corroborated by other witnesses who swear that he so announced at the time. Excluding the oral testimony of this character and the same result must follow from the undisputed facts. It is conceded that the clerk kept no minutes of the orders of the court, and that after the adjournment of the court for the term he changed the Judge's minutes, and then made such alteration the basis of his action in entering the judgment order. We are not advised of any rule of law or practice that would authorize such action of the clerk. The only written evidence of the action of the court remaining in his office was this memorandum made by the Judge upon his docket, and it would be an exceedingly dangerous practice to permit the clerk in vacation to substitute his recollection of the action of the court in any given case for such written evidence, even though in so doing he may honestly believe that he is correcting an error or mistake of the court. As he kept no minutes of the action of the court he should not have entered an order contrary to the court's minutes until ordered to do so by the court in some proceeding instituted for the purpose of correcting such minutes. If he had kept such minutes and the order entered by him had conformed thereto, a different question would be presented, one however not now requiring further notice. If we take an equitable view of the case it will appear that in correcting the judgment no injury was

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done the appellant. He, as shown by the final judgment in the replevin suit, had brought an unfounded action against the appellees here, and the costs were adjudged against him; and if a trial had taken place at the term the cause was continued a like result would have followed. And if the judgment should be corrected to conform to the intention of the court to continue generally (as the court has found the fact to be) the appellant would be in no better condition, as in such case all the costs would finally have been taxed to him, resulting the same as the order that was actually entered, as evidenced by the Judge's minutes. The evidence being sufficient to sustain the decretal order in setting aside the execution sale and certificate, upon the grounds above stated we affirm it, without inquiring whether the other disputed fact, that the lots were the homestead of the appellant, has been proven.

Decree affirmed.

HENRY BINGER

V.

THE PEOPLE OF THE STATE OF ILLINOIS.

Criminal Law—Elections—Indictment under Sec. 86, Ch. 46, R. S.—Contents of—Alteration of Ballots—Election of Town Officers—Application of General Laws.

1. An indictment charging the defendant, as judge of an election, with having altered and defaced ballots legally voted at such election, need not contain the names of the electors whose ballots are alleged to have been altered.

2. The mere fact that a name on a ticket is scratched raises no presumption against a judge of the election that he made the erasure.

3. It is no objection to such an indictment that the defendant is charged therein as a judge of election at an election for township officers. The general laws of the State apply to elections for town officers at elections held under the Township Organization Act.

4. In the case presented it is held that the evidence does not show the defendant to have been a "legally qualified judge of election," another person having been chosen moderator of the town meeting.

[Opinion filed November 24, 1886.]

Binger v. People of the State of Illinois.

APPEAL from the Circuit Court of Madison County; the Hon. WILLIAM H. SNYDER, Judge, presiding.

Mr. WILLIAM P. BRADSHAW, for appellant.

Mr. GEORGE F. McNULTY, for appellees.

GREEN, J. Appellant was indicted by the grand jury of Madison County for an alleged violation of the provisions of Chap. 46, Rev. Stat. 1883, entitled "Elections," and, waiving a jury, was tried by the court, found guilty, and a fine of \$200 imposed. The court entered judgment for the amount of fine and costs, to reverse which judgment this appeal was taken. The indictment in substance charged that defendant, while being a legally qualified and acting judge of election, at an election held in the township of St. Jacob, in said Madison County, for the election of certain township officers of said township, as such judge of election did fraudulently, corruptly, wilfully and illegally alter and deface certain ballots legally voted at such election, by drawing a pencil mark on each of said ballots through the name of Jacob Schroth, then and there a candidate at such election for the office of township Assessor, with the intent of depriving such electors from voting for said Jacob Schroth for said office at said election, as they intended to do. This prosecution is based upon the 6th clause of Sec. 86, of said Chap. 46, which provides: "If any judge of any election shall be guilty of any fraud, corruption, partiality, or manifest misbehavior, the penalty, on conviction, shall be a fine not exceeding \$1,000, or imprisonment in the county jail not exceeding one year, or both, in the discretion of the court." A motion to quash the indictment was interposed on behalf of defendant in the court below, but the court overruled the motion, and this decision is one of the errors assigned. The indictment is said to be bad for the reason the names of the electors are not given, whose ballots are alleged to have been altered and scratched, and that defendant should have been informed by the indictment who they were, in order that he might have an opportunity to prove, by the voter himself, that he altered or scratched the ballot, and voted it as it appeared when can-

vassed. There is no force in this objection. The mere fact that a name on a ticket is scratched raises no presumption against a judge of election that he made the erasure. Nor did the omission of the names work defendant any injury or abridge the measure of proof necessary to convict. The wrongful and corrupt act must be proven as alleged, notwithstanding such omission.

It is also urged as another objection to the indictment that defendant is charged therein as a *judge of election* at an election *for township officers*; that an *election* for such purpose is unknown to the law, but a *town meeting* to select township officers, and not an election, is provided for by the statute, Chap. 139, Rev. Stat. 1874, title "Township Organization," and that under this statute such officers, as judges of election, are unknown. An examination of this statute will demonstrate that an election for town officers is provided by Sec. 1, article 7, and by Sec. 3, same article. The moderator so chosen shall have the same power and be subjected to the same penalties as other judges of election. It clearly appears such an officer as judge of election is known under the statute, and if guilty of such official malfeasance as is charged in said indictment would, as a judge of election, be subject to punishment for such offense under the act upon which this prosecution is based; but to remove all doubt on this question, Sec. 8 of said article 7, "Township Organization Act" provides: "The general laws of the States in regard to elections and qualifications of voters shall apply to all elections to be held under this act. * * *" Now the only elections to be held under that act are for township officers, or for adopting or discontinuing township organization; and the general law which shall apply thereto is Chap. 46, entitled "Election." The intent and purpose of this section is (among other things) to subject judges of elections held under said Township Organization Act, and voters at such elections, subject to the operation and effect of the provisions of said Chap. 46. If this Sec. 8 and the other statutes cited do not bear the construction we have placed upon them, then in this State we are without a statute under which illegal voting at

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an election for township officers, or official misconduct of judges of such election, can be punished. Satisfied with the construction we have given these various clauses of the statute, we hold the indictment good, and the court below properly overruled the motion to quash.

We are obliged, however, to reverse the judgment because the proof fails to establish the material allegation that defendant was "a legally qualified judge of election," but on the contrary it appears from the evidence a person other than himself was chosen moderator, acted as such, and thus became judge of the election; hence defendant was not and could not have been legally qualified to act as a judge of such election, and while he might be estopped from denying this, if he had acted in that capacity at an election when he could by law have been such judge while another lawfully chosen was acting as such, this was not the fact here. We think the proof shows that defendant wilfully mutilated ballots at said election, and had the grand jury indicted him as an individual for a violation of Sec. 93, Chap. 46, he would have been liable and could have been punished. The judgment is reversed.

Reversed.

CLOVIS SOUCY

V.

THE PEOPLE EX REL. NICHOLAS MCCrackEN.

Quo Warranto to Try Title to a Public Office—Decision of the Supreme Court on Former Appeal, Conclusive—Fraud.

Upon a second appeal, in a proceeding in the nature of a *quo warranto* to try the title of the respondent to the office of Supervisor, it is *held*: That the decision of the Supreme Court, reversing the decision of this court, affirming the original judgment of ouster of the court below, is conclusive of the case as presented by the present record, the ground of said reversal being the failure of the relator to establish his election as successor to the respondent; and that it is immaterial whether the respondent was elected, there being no one else elected to succeed him.

[Opinion filed November 24, 1886.]

Soucy v. McCracken.

APPEAL from the Circuit Court of St. Clair County; the Hon. AMOS WATTS, Judge, presiding.

Messrs. KOERNER & HORNER, for appellant.

Messrs. R. A. HALBERT and M. MILLARD, for appellee.

The case was reversed and remanded upon the former appeal, without any direction whatever, on the single point that the affidavit for a continuance was sufficient. This was the only error noticed by the court or assigned as a reason for sending the case back for another trial. No other question was decided, notwithstanding some remarks which were evidently based upon the assumption that the affidavit was true. It was thought the affidavit gave the correct state of facts, but that was far from the truth.

It was proper to re-try the case on all questions affecting the merits. *Chickering v. Failes*, 29 Ill. 294; *Elston v. Kennicott*, 52 Ill. 272; *Mohler v. Weltberger*, 74 Ill. 163.

It is said in these cases that the very object in remanding is to enable the parties to furnish additional evidence and obtain a decision upon their legal rights, regardless of technical objections.

WILKIN, P. J. This was a proceeding, begun in the Circuit Court of St. Clair County, in the nature of a *quo warranto*, to try the validity of appellant's claim to the office of supervisor of the village of Cohokia. The case was previously submitted to this court, and a judgment of ouster rendered by the said Circuit Court affirmed. On appeal to the Supreme Court that judgment was reversed and the cause remanded with directions to reverse the judgment below and remand the case. On a second trial judgment of ouster was again rendered and appellant appeals. We hold that the decision of the Supreme Court, reported in Volume 113, page 109, Illinois Reports, is decisive of this case as presented by the present record, and that upon its authority the judgment of the Circuit Court must be again reversed. It is true that one reason assigned by the Supreme Court for the reversal of the former judgment (the overruling appellant's motion for continuance) does not appear from this record, but it is mani-

N. B. & M. A. Ass'n v. Woods.

fest from the language used by Justice Scott, who delivered the opinion of the court, that the substantial ground of reversal was the failure of relator to establish his election to the office of Supervisor as successor to appellant. From a careful comparison of the facts appearing in the present bill of exceptions with those recited and referred to in that opinion as existing in the record then before the Supreme Court, we are convinced that the same conclusion must be reached now as was then on the issue, as to whether or not there was such fraud and violence used at the election at which relator insists he was elected, as to defeat his claim of title to the office in this proceeding. Therefore, whether appellant was duly elected at that election or not is immaterial. No one else appearing to have been legally elected to succeed him, and he being by law authorized to hold the office until his successor should be elected and qualified, he can not, as is expressly decided in the former appeal to the Supreme Court, be held an usurper of the office as adjudged by the Circuit Court, and its judgment must therefore be reversed.

Reversed.

NORTHWESTERN BENEVOLENT AND MUTUAL AID
ASSOCIATION OF ILLINOIS

V.

LEE WOODS, GUARDIAN, ETC.

Action on Certificate of Mutual Aid Association—Default—Presumption as to Amount of Judgment—Jurisdiction—Waiver of Statutory Privilege—Issue of Writ to Sheriff of another County—Certainty—Construction.

1. A defendant is entitled to know from the summons where he is to appear.

2. If, taking the whole writ together, he can determine where he is required to appear, it is sufficient.

3. In the case presented, it is *held*: That a writ issued from one county to the Sheriff of another is sufficiently certain, the application of the words, "said county," being made clear by considering all the parts of the writ together.

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4. Where a statute confers a mere privilege, upon a defendant, of exemption from suit except in the county where found, he will be presumed to have waived such privilege unless he especially relies upon it by way of plea.

5. In an action on a certificate of membership in a mutual benefit association, entitling the children of the holder to participate in its relief fund to a certain amount, or such part thereof as might be collected, as specified in the constitution and by-laws of the association, it is held by this court, in reviewing a judgment by default for the full amount of the certificate, that in the absence of a bill of exceptions it is to be presumed that the finding of the court below was supported by the evidence heard by that court.

[Opinion filed November 24, 1886.]

IN ERROR to the Circuit Court of Edwards County; the Hon. C. C. Boggs, Judge, presiding.

Statement of the case, by PILLSBURY, J. The record in this case shows a summons and return as follows:

STATE OF ILLINOIS, }
EDWARDS COUNTY. } ss.

The People of the State of Illinois to the Sheriff of McLean County. Greeting: We command you to summon the Northwestern Benevolent and Mutual Aid Association of Illinois, if it shall be found in your county, personally to be and to appear before the Circuit Court of said County on the first day of the next term thereof, to be holden at the Court House in Albion in said County on the second Monday in November, 1885, to answer unto Lee Woods, guardian of Ernest G. Mann and Herman L. Mann, in a plea of assumpsit, to the damage of said plaintiff, as he says, in the sum of \$2,000; and have you then and there this writ with an indorsement thereon in what manner you shall have executed the same.

{ SEAL }

Witness William B. Tribe, Clerk of our said court and the seal thereof, at his office in Albion in said Edwards County this 3d day of July, A. D. 1885.

WILLIAM B. TRIBE, Clerk.

By CHARLES EMERSON, Deputy Clerk.

Upon which summons there appears the following indorsement and return:

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STATE OF ILLINOIS, }
McLEAN COUNTY. } ss

Executed the within writ this 7th day of July, 1885, by reading it and delivering a true copy of the same to Peter Whitner, President of the Northwestern Benevolent and Mutual Aid Association of Illinois, as I am therein commanded.

W. H. SWAIM, Sheriff.

C. W. HITCH, Deputy.

A declaration was filed from which it appears that on the 27th day of December, A. D. 1883, the defendant below issued a certificate of membership to Malinda T. Mann in and by which she was entitled to participate in the beneficiary or relief fund of the association to the amount of \$3,000 or such part as should be collected in accordance with the constitution and by-laws, payable within sixty days after her death, \$2,000 to John C. Mann, her husband, and \$1,000 to her children. This \$1,000 to the children is involved in this suit. On the first day of the term the defendant was defaulted and the court heard the evidence and assessed the damages at \$1,000 for which judgment was rendered and the defendant sued out a writ of error and had the record removed into the court.

Messrs. McNULTA & WELDON and HAMILTON SPENCER, for plaintiff in error.

It was unlawful to issue the writ in this case to the Sheriff of McLean County, and all proceedings under it are void. Starr & C. Statutes, 1771, Sec. 1; 1773, Sec. 2; 1775, Sec. 3; 1350, Sec. 130.

The writ upon its face is void for uncertainty, in commanding the defendant to appear before the Circuit Court of McLean County, at the court house in Albion, in said county. Orendorff v. Stanberry, 20 Ill. 89; Gill v. Hoblit, 23 Ill. 473.

This action not being within the exceptions named in the statute, and the defendant, as shown by the record, being a resident of McLean County, and not found elsewhere, suit against it elsewhere is expressly prohibited and made unlawful. Facts shown by the record need not be pleaded. This

record shows all facts requisite to make a good plea to the jurisdiction. *Humphrey v. Phillips*, 57 Ill. 137.

It appears, upon the facts of the record, that this is not a local action; that there is but one defendant, which is not a railroad or bridge company, and that the home of this defendant is Bloomington, Illinois, and that this suit was not brought under the attachment laws of this State. By section 2 of the Practice Act, it is provided: "It shall not be lawful for any plaintiff to sue any defendant out of the county where the latter resides, or may be found, except in local actions."

Messrs. ROBINSON & JOHNS, for defendant in error.

PILLSBURY, J. The assignment of errors upon this record questions the action of the court in assuming jurisdiction over the defendant upon the grounds:

First, that the summons was void upon its face for uncertainty as to where the defendant was to appear; and second, that the summons was issued to a foreign county. It is claimed under the first ground that the summons being directed to the Sheriff of McLean County commanding him to "summon the defendant, if it shall be found in your county, to appear before the Circuit Court of said county, on the first day of the next term thereof, to be holden at Albion in said county on, etc.," is so uncertain as to where the defendant is to appear as to render the process void. Under the rule announced in *Orendorff v. Stanberry*, 20 Ill. 89, and *Gill v. Hoblit*, 23 Ill. 473, if the above quotation from the writ was all that appeared therein to apprise the defendant of the place where it was to appear, we should be obliged to hold that it fell within the cases named; but it is to be noticed that in the attestation clause of the writ in this case, the county of the venue is named as well as the town from which the writ issued, and therein is the case distinguished from those cited; the defendant is required to appear at a Circuit Court to be holden in *Albion in said county* and the uncertainty consists in determining whether "said county" refers to the county of the Sheriff serving the writ or to the county of the

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clerk issuing it as stated in the venue of the writ; but when it is remembered that the place where the court is to be held is not only named in the body of the writ, but is also stated in the attestation clause as being in "said Edwards County," it is made quite certain that "Albion in said county" named in the body of the writ refers to "Edwards County" as named in the venue of the writ and not to the County of McLean, to the Sheriff of which the writ is directed to execute, as was held in the case cited from the 23d Ill. "A defendant has the right to certainly know where he is to appear," and when the writ fails to give him this knowledge he has the right to remain quiet and do nothing, as was held in *Gill v. Hoblit*, 23 Ill. 473. But if taking the whole writ together, the defendant can see therefrom where he is required to appear, it would seem that he could not be misled to his prejudice, and in such case the object of process would be sufficiently accomplished. The Sheriff returns that he served the writ by reading it to the president of the company and giving him a true copy of it, and the presumption must be indulged that his return is true, and if so, can it for a moment be supposed that any man of reasonable intelligence with a copy of the entire writ before him would conclude that Albion, the place designated for the defendant to appear, was in McLean County. It is stated in another part of the writ to be in Edwards County, and it would require extreme credulity to believe that the county seat of each county was a town or city named Albion. As the writ informed him that the defendant was to appear at Albion and in which county Albion was situated, the ambiguity that appeared upon the face of the writ in the two cases relied upon does not exist in this case.

As to the second ground urged in support of the objection that the court below had no jurisdiction, it is sufficient to observe that the statute confers a mere privilege upon the defendant which he can waive, and will be deemed to have done so unless he shall especially rely upon it by way of plea. Such is the holding of the court in *Drake v. Drake*, 83 Ill. 626, where it is said that all the cases since *Kenney v. Greer*, 13 Ill. 432, agree in this construction of the statute. No plea was

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interposed in this case, and the plaintiff in error is not in a position to rely upon the objection.

It is objected to the judgment that it is for a sum certain, when the certificate gave the right only to participate in a relief fund to the amount of \$3,000, or such part thereof as may be collected, etc. The record shows that the court heard evidence and assessed the damages, and there being no bill of exceptions, we are to presume that the evidence was such as to support the finding of a certain sum. From aught that appears in the record the court may have found from the evidence that all the requirements of the constitution and by-laws relating to the collection of the mortuary benefit provided for in this certificate had been complied with, and that the defendant had the money on hand at the commencement of this suit, but was wrongfully withholding it from the plaintiff. If so, we can not see wherein the judgment was not properly entered for the amount of the certificate. We find no substantial error, and the judgment will be affirmed.

Judgment affirmed.

NORTHWESTERN BENEVOLENT AND MUTUAL AID ASSO-
CIATION OF ILLINOIS

v.

JOHN C. MANN.

Practice—Error without Injury—Damages—Computation.

This court will not, upon a writ of error, reverse a judgment for an error which worked no injury to the plaintiff in error.

[Opinion filed November 24, 1886.]

IN ERROR to the Circuit Court of Edwards County; the Hon. C. C. Boggs, Judge, presiding.

Messrs. McNULTA & WELDON and HAMILTON SPENCER, for plaintiff in error.

21	377
92	129

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Messrs. ROBINSON & JOHNS, for defendant in error.

This case is like the preceding one in all respects except a recital in the record that after default the plaintiff's attorneys computed the amount due at \$2,000, and reported the same to the court, which proceeding is claimed to be erroneous.

It does not appear from the record that the court acted upon such computation in assessing the damages. On the contrary, it recites that the assessment was made upon evidence produced in court, so no harm was done by any action of the counsel in computing the amount due.

Judgment affirmed.

PIERSON W. MCNAIL AND MARTHA J. MCNAIL

V.

ANDREW WELCH.

Foreclosure—Usury—Commutation of Amount due on Note—Reversal for Error in Remittitur—Mistake in Amount of Note—Practice.

1. This court reverses a decree of foreclosure on the ground that it does not satisfactorily appear that a *remittitur*, filed by the complainant, will correct an error in the amount of the decree.

2. While this court is not inclined to disturb the finding of the court below on the question whether there was a mistake in the amount of the note sued on, it is suggested that either party should be allowed to introduce further evidence on that issue, if desired, upon the rehearing.

[Opinion filed January 8, 1887.]

APPEAL from the Circuit Court of Washington County; the Hon. GEORGE W. WALL, Judge, presiding.

Mr. J. M. DURHAM, for plaintiff in error.

Messrs. A. H. CARTER and W. S. FORMAN, for defendant in error.

McNail v. Welch.

A higher court will be very cautious in disturbing a judgment solely on the ground of its being against the weight of testimony. *Bishop v. Busse*, 69 Ill. 403; *Sturman v. Streamer*, 70 Ill. 188; *Illinois & St. L. R. R. Co. v. Ogle*, 92 Ill. 353.

Defendant in error files herewith his remittitur for \$25, which cures the only error in the record. It has been repeatedly held that the higher court will not reverse a judgment on this account when a remittitur is filed. *Cheney v. City National Bank*, 77 Ill. 562; *Pixly v. Boynton*, 79 Ill. 351; *Convey v. Sheldon*, 1 Ill. App. 555; *People v. Steele*, 7 Ill. App. 20.

WILKIN, P. J. On the 10th day of May, 1882, plaintiffs in error executed to defendant in error their deed of mortgage of that date, to secure the payment of a promissory note then made by the said Pierson W. McNail, for \$1,250, due three years after date, with eight per cent. interest from date, and if not paid within three days after due the maker to pay two per cent. damages. This is a proceeding in chancery to foreclose that mortgage. The answer admits the execution of the mortgage and note, but avers that the note was given in renewal of another note, and that by mistake a payment which had been made on the former note of \$1,000 was not deducted, and also pleading usury.

The court below found for defendant in error on the issue of payment and against him on the issue of usury, and adopting a computation by the Master in Chancery rendered a decree of foreclosure, as prayed in the bill, for \$1,025.

The errors assigned are: 1st. That the Circuit Court erred in its finding on the issue of payment; 2d. The Circuit Court erred in finding \$1,025 due, and decreeing that amount in favor of defendant in error. It is admitted by defendant in error that this last error is well assigned, but he seeks to avoid a reversal on that ground by filing a remittitur in this court of \$25. It is also conceded that the court below found correctly on the issue of usury, and that defendant in error was only entitled to a decree for the amount of the principal of said note, less the payments made thereon. Therefore in de-

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termining whether or not the remittitur will reduce the decree to the proper amount, (assuming that the finding is correct on the issue of the payment of \$1,000,) it is only necessary to ascertain, if we can, what payments were made after this note was given. On the back of the note appears the following indorsements made in the following order:

May 10, 1883, interest paid to this date; March 16, 1884, received on principal \$25; November 17, 1884, received \$80, on interest; May 10, 1884, all interest paid to this date. If these indorsements correctly state the account between the parties, the amount of all the payments may be readily obtained by computation. The interest to May 10, 1883, was \$100; to March 16, 1884, when \$25 was paid on principal, \$85; to May 10, 1884, on \$1,225, \$14.96, which, with the \$80 paid November 17, 1884, makes the total amount of interest paid, \$280.46, and this sum added to the \$25 paid on principal March 16, 1884, gives the total amount of the payments, \$305.46, and \$80.46 more than was allowed by the court below. It is true that plaintiff in error McNail, on cross-examination, only mentions payments amounting to \$250, but he gives amounts wholly differing from those indorsed on the note, and does not say that the payments he mentions were all he made. For instance, he states that he gave a mare at \$150 at one time. No such payment appears on the note, nor does defendant in error deny it. On the contrary, he says the \$25 credited on the principal was paid at the same time he got the mare. Nor does he or any other witness undertake to explain how the \$150 was applied, if credited. It may be that the several indorsements on the note are susceptible of an explanation consistent with the assertion of counsel that only \$250 was paid, but without such explanation the record does not sustain it. There seems to have been very little effort on the hearing to get at the payments with any degree of certainty, perhaps for the reason that other issues were then deemed more important. At least the evidence, as it appears from the record before us, is so uncertain and unsatisfactory that we can not undertake to state the account between the par-

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ties; and holding that it does not satisfactorily appear that the remittitur filed will correct the error in amount, the decree must be reversed and the cause remanded. Recognizing the superior opportunity of the Judge who heard the case in the Circuit Court to settle the issues of fact, so far especially as they rest in oral testimony, we should not feel inclined to disturb his finding on the question as to whether there was a mistake in the amount of the note sued on, resulting from an omission to credit the alleged payment of \$1,000 or \$1,010, as it is said in the evidence. It can not, however, be denied that the evidence strongly tends to show that a payment of some amount was made about the time alleged, of which no account was taken when this note was executed. Of course all the presumptions arising from the transactions between the parties strongly corroborate the defendant in error, and we are not to be understood as expressing any opinion on this question of fact, farther than to say that inasmuch as the cause must be remanded either party should be allowed to introduce further proof on this issue, if they so desire, upon the rehearing.

Reversed and remanded.

GERHARD W. GARRELS, IMPL'D G. W. CONE

V.

GEO. C. MEYER, E. MEYER, A. F. BANDELIER AND
H. R. MORTEN.

Foreclosure of Trust Deed—Alleged Agreement for a Release between Subsequent Purchaser and Agent of Holders of Notes Secured—Review of Evidence—Agency, not Sustained.

Upon a bill to foreclose a trust deed of lands, forty acres of which are claimed by a subsequent purchaser who claims to have paid a certain part of the purchase money due the maker of the trust deed to the agent of the holder of the notes secured thereby, upon an agreement with said agent to procure the release of said forty acres, it is held, upon a review of the evidence, that the agency claimed is not established thereby.

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[Opinion filed January 8, 1887]

APPEAL from the Circuit Court of Marion County; the Hon. AMOS WATTS, Judge, presiding.

Statement of the case by WILKIN, P. J. This was a chancery proceeding to foreclose a trust deed. The bill avers that on the 3d day of February, 1880, George C. Meyer and wife executed to F. Ryhiner & Co., their four promissory notes, aggregating in amount \$3,500, due five years after date, with eight per cent. interest payable semi-annually at the office of F. Ryhiner & Co., their receipt therefor to be good and valid against any subsequent holder of such notes. The principal also payable at the office of F. Ryhiner & Co., sixty days before maturity of said notes. On the same day said Meyer and wife executed and delivered to one Adolphus F. Bandelier, as trustee, a deed of trust to secure the payment of their said notes on real estate in Marion County, Ill., George W. Cone being named as the successor in trust of Bandelier in case of his death, removal, etc.

On the 23d day of March, 1880, F. Ryhiner & Co. assigned all of said notes to Gruner, Haller & Co., of Berne, Switzerland. Subsequently Gruner, Haller & Co. assigned them to different parties, and they to appellant Garrels, who, with George W. Cone, successor in trust, etc., are complainants in the bill. Hugh P. Morton, one of appellees, is made a party defendant, the bill alleging that he claims some interest, which, if any, is junior to and subject to their lien. He alone answers, and so much of his answer as is material to be considered in deciding this case is as follows: By his answer he admits the execution of said notes and mortgage, and also the several assignments of said notes as stated in the bill of complaint, and that the complainant Garrels is the legal holder of said notes as stated in the bill, avers that he is the owner in fee of part of the lands described in the bill, and that his interest therein is not subject to the lien of said deed of trust or of the complainant Garrels as the holder of said notes. That the complainant Cone is now and for more than six years last past

has been engaged in loaning money for different persons, and that said Cone procured the loan of said Ryhiner & Co. to the defendants, George C. and Elizabeth Meyer, mentioned in the bill, and that he acted as the agent of said Ryhiner & Co. in negotiating said loan *and also the agent of the complainant Garrels in purchasing the said notes, collecting interest thereon and receiving payments, and generally acting as the agent of said Garrels, securing loans and collecting moneys for said Garrels.* That in the year 1883, and while said Cone was such agent of said Garrels as aforesaid, the respondent and one Wyatt were about purchasing of said Meyer some 400 acres of land, among which land was the said above described forty-acre tract. That said Cone being anxious to collect from said Meyer the moneys coming from them to *said Garrels on the notes and trust deed* in the bill of complaint mentioned, and to induce this defendant to make such purchase, agreed with this defendant, in consideration that \$1,200 out of the purchase money which this defendant and said Wyatt were to pay to said Meyer for said 400 acres of land, should be paid on said indebtedness of said George C. and Elizabeth Meyer *to said Garrels, said Garrels would have the said trust deed released from the said forty acres of land.* That in pursuance of said agreement the defendant and said Wyatt purchased of said George C. Meyer 400 acres of land among which were the above described forty acres for \$4,800, and which said forty acres were then and there conveyed by said George C. Meyer and wife by warranty deed, and the defendant then and there took possession of said land, and from thence hitherto and now is in possession of the same. That the defendant caused to be paid to said Cone the said sum of \$1,200 to be applied on said trust deed and notes *to said Garrels,* and that said sum of \$1,200 so paid on said notes is much more than a *pro rata* part of said indebtedness on all of said land described in the bill agreeable to the value of said lands, and that the other lands described in the bill are ample security for the balance due on said notes and trust deed. And that by reason of the aforesaid agreement of said Cone to release said forty acres, the defendant

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took no security from said Meyer that he said Meyer, would pay off and discharge said trust deed upon said forty acres, and that said Meyer has no more means than is exempt under the exemption laws of this State. The defendant further denies the allegation that no part of said notes have been paid off and discharged, but alleges that the complainant Cone, *agent and collector for said Garrels*, has received besides \$1,200, \$800 in all, \$2,000 or more on said notes, which said sums are credits to be allowed on said notes. The court below found for complainant and decreed a foreclosure as prayed, except as to the forty-acre tract claimed by appellee Morton, which it held was released, etc. On the hearing the complainants read in evidence the notes with the indorsements thereon, as set out in Exhibits "A," "B," "C" and "D" to the bill. Also the deed of trust, with the certificates of acknowledgment and recording, as set out in "Exhibit E." The defendant thereupon testified in his own behalf, as follows: I and one Wyatt bought 400 acres of land from George C. Meyer for \$4,250; of this land forty acres were covered by the deed of trust involved in this suit, being the same forty acres described in the answer. And there was a mortgage on the rest of the land purchased in favor of F. Ryhiner & Co. for \$3,000 which was assumed and paid off. We paid the money to George W. Cone, the agent of F. Ryhiner & Co., and he procured a release for the same and did all the business. The principal and interest was all received by him; we did not know any one else in the whole transaction, and the balance of the money we paid to George C. Meyer. This money, the \$1,200, was to be used to get a release of the forty acres. I had made the contract to purchase, with Meyer, and then I went to Nashville and saw Mr. Cone; did not see him the first time and made the second trip, when I saw him, and he promised that if he got the \$1,200 that I was to pay to Meyer for this land that he would procure a release of these forty acres, but said it would be some time. He said he was glad that I made the arrangement, because he considered the \$1,200 more than the *pro rata* share of the mortgage. I may not have spoken

to Cone about a release till after I paid the \$1,200, but I am pretty sure I did, and paid Meyer the money to deposit in the Salem bank subject to Cone's order. Soon after, I got possession of the forty acres from Meyer and have been ever since in possession. The forty acres are worth about \$500 or \$600. Mr. Cone promised me to get the forty acres released several times, but never would fix a time, always saying it would take some time, until the last time I spoke to him when he said he would get the release "by the first day of next January," which was January 1, 1886. George C. Meyer testified: I received \$1,200, mentioned by the defendant Morton, and deposited them on January 29, 1883, in the bank at Salem, Ill., for George W. Cone, to be applied on this mortgage to release Morton's forty acres I sold him. Afterward, about the next day, I deposited \$800 more for the purpose of being credited on the same mortgage. Cone promised to get a release for the forty acres sold to Morton, and pretty soon. Morton bought the land from me in December, 1882. I wanted to stop the interest on the mortgage. Cross-examined: Cone told me to pay in the money and he would see it applied on three notes to keep interest paid and on the principal when due. They bought the 400 acres at \$12 per acre. Cone told me that Ryhiner & Co. were broke, and I would lose the whole of it unless I took some notes and mortgages on land in Jefferson County, and I took them rather than lose it all. I went to see about these, and learned the notes and mortgages he gave me were worthless. In that way Cone paid me the whole money. We made a final settlement on January 29, 1886, and I then gave him this receipt. Cone gave me, at the settlement, \$1,250 in securities, and he had paid interest for me on this mortgage for several years, and he accounted to me for the whole \$2,000 in that way, and I took them because he told me I would get nothing unless I settled that way as Ryhiner & Co. were broke all to pieces. These forty acres I sold to Morton are worth about the tenth part of the whole 340 acres included in the deed of trust involved in this suit. It was here admitted between the parties that the money deposited by Meyer in the bank as above

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stated was afterward drawn out by Mr. Cone. George W. Cone testified: Hugh R. Morton never spoke to me about obtaining a release for these forty acres until long after the money had been paid over to him, and I never promised absolutely to get him a release. I never was agent for any of the assignees of the notes involved in this suit. I was agent for F. Ryhiner & Co. to collect the interest but not the principal. I was not agent for F. Ryhiner & Co. in receiving these \$2,000 from Meyer, but that was a matter exclusively between me and Mr. Meyer. I received the money to invest for Meyer until the mortgage should be due, and I used the interest accruing on the investment in paying interest on the mortgage involved in this suit. I invested that money in April, 1883. Used the blank notes of F. Ryhiner & Co. because I liked the form the best, and I assigned the notes to Meyer at the time but kept them in my safe until this receipt was signed. These notes, taken for the \$2,000 paid to me by George C. Meyer, were made payable to F. Ryhiner & Co. and remained in my hands until two days after this bill was filed, and in them was included the \$1,200 paid by Morton to Meyer, if I got that money, and then on the 29th day of January, 1886, I delivered the notes to Meyer and he gave me the receipt identified by Meyer and which reads as follows:

McLEANSBORO, ILLS., Jan. 29th, 1886. Received of W. G. Cone, sixteen hundred and twenty-three dollars in full of said amount deposited in Salem National Bank by me to credit of account of said Cone. This rec't to be a full settlement of said amount and accrued interest on same. Said deposit was made 1883.

GEORGE C. MEYER.

I told him I could not take money before it was due. Cross-examined: I had authority to assign the notes to Meyer. I had been paying interest for Meyer on these notes involved in this suit, and when I made final settlement with Meyer I paid him part in money. I do not think I ever promised Morton to get a release of his forty acres in this mortgage, but did promise I would get it if I could. Don't think I told him I would get it by January 1, 1886.

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Messrs. W. C. KUEFFNER and T. E. MERRITT, for appellant. Ryhiner & Co. were constituted the agents of the assignees of the notes for the sole purpose of collecting the accruing interest and principal "against receipt of said F. Ryhiner & Co. therefor, and the receipt of said F. Ryhiner & Co. for interest and principal to be good and valid toward any subsequent owner of said notes."

This was a special limited agency, to be exercised in a special manner. It gave Ryhiner & Co. no power of substitution, and no power to do any act other than that specially authorized, and persons dealing with them were bound to inform themselves of the extent of their authority.

"Where parties deal with an agent having written authority, they must inform themselves of its extent and its limitations." Rawson v. Curtiss, 19 Ill. 456.

An agent to collect a note has no power to extend the time of payment. Lawrence v. Johnson, 64 Ill. 351.

"An agent appointed for a special purpose can not go beyond the scope of such appointment and bind his principal." Denman v. Bloomer, 11 Ill. 177; Baxter v. Lamont, 60 Ill. 237.

Persons dealing with agents must know their authority. C. & G. E. R. R. Co. v. Fox, 41 Ill. 106; Dutcher v. Beckwith, 45 Ill. 460; Peabody v. Hoard, 46 Ill. 242; Davidson v. Porter, 57 Ill. 300; Reynolds v. Ferree, 86 Ill. 570.

Mr. HENRY C. GOODNOW, for appellee.

The mortgagor, Meyer, sold part of the mortgaged land to Morton, with the agreement that it would be released, without any notice, actual or constructive, that the notes had been assigned.

The mortgage not being negotiable paper, the purchaser of notes takes it as an incident and subject to all equities in favor of the mortgagor and his grantees. Olds v. Cummings, 31 Ill. 188; Haskell v. Brown, 65 Ill. 29; Bryant v. Vix, 83 Ill. 11; Silverman v. Bullock, 98 Ill. 11; Melendy v. Keen, 89 Ill. 395, 404.

The mortgagor, to release himself from liability on his note, must see that he pays the money to the holder of the note

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who has received it by assignment before maturity, but not so to discharge the mortgage because it is not assignable at law. *Towner v. McClelland*, 110 Ill. 542, 551.

WILKIN, P. J. The only question presented for our decision is, did the court below err in decreeing that the forty acre tract, owned by Morton, is held by him discharged of the lien of the trust deed sought to be foreclosed. In the foregoing statement of the case so much of Morton's answer raising that issue and substantially all the evidence bearing upon it is set out, and a casual examination thereof will, we think, make clear our reasons for reversing the decree. The argument of counsel seems to proceed upon the assumption that the defense set up is that Ryhiner & Co., after the assignment of the notes secured by the trust deed, by their agent Cone, agreed to release, or procure a release of the forty acre tract, and authorities are cited on both sides as to defenses available to the mortgagor or his grantee against the assignee of the debt secured by the mortgage, growing out of equities between the defendant and the mortgagee, appellee relying upon the case of *Towner v. McClelland*, 110 Ill. 542, to sustain the decree, while appellant, arguing on the same hypothesis, cites *Keohane v. Smith*, 97 Ill. 156. Applying the elementary rule of practice both in law and equity, that the allegation and proof must agree, the question discussed does not arise. By his answer the defendant, Morton, did not pretend that in his negotiation for a release he dealt with Cone as the agent of Ryhiner & Co. On the contrary he avers in every part of it that he was the agent of the complainant, Garrels, and that whatever contract he made with him was in that capacity. By his answer he admits that at the time he contracted with Cone he knew that the complainant, Garrels, was the owner of the negotiable notes secured by the trust deed, which were then not due, and by that averment he is bound. How can it then be said that any question as to the equities between Ryhiner & Co. and Morton is involved in the decision of this case? The issue, submitted to the court, was whether or not the legal holder of the notes and the equitable owner of the

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trust deed, Garrels, by his agent, George W. Cone, agreed to procure the release. On this issue the burden of proof was upon appellee Morton. There is no evidence in the record tending to prove it. Cone swears positively that he "never was agent for any of the assignees of the notes involved in this suit." Whatever equitable rights appellee Morton may have under a proper state of pleading, this decree can not be sustained. It is therefore reversed and the cause remanded with directions to the court below to allow the defendant, Morton, to amend his answer if he shall so desire.

Reversed and remanded.

JAS. C. WAUGH, IMPL. C. H. CAMFIELD AND CHAS. M.
GLASER

V.

CASIMIR ANDEL, TRUSTEE OF COMPANY "A" BELLE-
VILLE GUARDS.

*Equity Jurisdiction—Note Payable to Captain of Military Company—
Bill Filed by Trustee.*

1. The trustee of a military company, which has no Captain, may maintain an action in equity on a note made payable to its Captain for money borrowed of the company.

2. The transfer of the note by vote of the company to the trustee, for collection, conferred upon him sufficient interest in the note to enable him to maintain suit thereon.

[Opinion filed January 10, 1887.]

IN ERROR to the Circuit Court of St. Clair County; the Hon.
WILLIAM H. SNYDER, Judge, presiding

Statement of the case by PILLSBURY, J. Company "A," Belleville Guards, was organized as a part of the militia of the State, and for service rendered the State, and from other sources, it became possessed of quite a sum of money which

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it deposited with the treasurer of the company, and from time to time, loaned the same. August 3, 1880, having about \$400 in the treasury, one C. H. Camfield applied for a loan of that amount, and the company directed the treasurer to loan the same, taking note with security therefor. The said Camfield thereupon presented to the treasurer of the company the following promissory note and received the money.

\$400.00.

BELLEVILLE, ILL., August 9th, 1880.

Six months after date we, or either of us, promise to pay to the Captain of Company "A" Belleville Guards, or order, the sum of four hundred dollars for value received, with eight per cent. interest per annum from maturity, at the office of the First National Bank of Belleville.

C. H. CAMFIELD,
CHAS. M. GLASER,
J. C. WAUGH."

The treasurer reported the loan to the company and being approved, he retained the note in trust for its members. The Captain of said company resigned about November 1, 1881, which resignation was accepted, and no other Captain was thereafter elected, and some time in August, 1884, the company, as an organization, ceased to exist. At the time said company voted to disband in August, 1884, they ordered the treasurer to turn over said note to the appellee to be held by him in trust for the company, and to collect the same and account for the proceeds. The treasurer complied with this direction and delivered the note to appellee who filed this bill against the makers alleging the above facts, and asked a decree for its amount. The appellant, Waugh, filed a general demurrer to the bill, which was overruled, and he abided and sued out this writ of error.

Mr. MARSHALL W. WEIR, for plaintiff in error.

Mr. E. L. THOMAS, for defendant in error.

PILLSBURY, J. The money loaned to Camfield belonged to

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the company, and the note, payable to the Captain would, when delivered to him, be held by him in trust for the company. There being no Captain of the company there is no payee in existence who can bring a suit at law or in whose name the company can bring such suit for its use. No adequate remedy at law exists to enforce payment of the note and equity will therefore take jurisdiction. The company retained the note in its treasury as its property until it voted to transfer to the appellee to be held and collected by him for the use of the company and this we think conferred upon him a sufficient interest therein to maintain this bill. He thereby became the lawful holder of it and a recovery by him will discharge the note, and that is all the makers have any right to demand. The decree will be affirmed.

Affirmed.

ADDE ADEN
V.
JULIA ANN CRUSE.

Dram Shop Act—Strict Construction—Right of Action of injured Person—Sec. 9 Only Applies Against Those Engaged in Liquor Traffic—Treating, Not Within.

1. The Dram Shop Act being highly penal in its provisions must be strictly construed in keeping with the object of its enactment.

2. Sec. 9 of said act, giving a right of action to one injured in his means of support in consequence of the intoxication, habitual or otherwise, of any person, only applies, when fairly construed as part of the act, against those who are directly or indirectly engaged in the liquor traffic.

3. Said section does not give a right of action against a person not engaged in such traffic, who, as an act of courtesy or politeness, treats another to a glass of intoxicating liquor without any purpose of gain or profit.

[Opinion filed March 9, 1887.]

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APPEAL from the Circuit Court of Union County; the Hon. OLIVER A. HARKER, Judge, presiding.

MESSRS. CRAWFORD & BUSSEY, for appellant.

In the case of *Albrecht v. People*, 78 Ill. 510, it is declared that every section of the Dram Shop Act is aimed at dram shops and those who keep them, and that its provisions do not extend to those who only treat a friend as an act of hospitality or friendship.

"The statute gives the wife a right of action only in cases when, by the selling liquor to a drunken husband, the wife has been injured thereby in person or property or means of support." *Fentz v. Meadows*, 72 Ill. 542. We believe this to be the true intent of the law. The Legislature in passing this act evidently had in mind the *business* of dealing in liquors. The statute throughout refers to the business. The words "selling or giving away" were evidently intended, taking this entire statute into consideration, to apply to gifts or sales at such places, and by those engaged (legitimately or otherwise) in such business. The provision as to gifts of liquor is, we think, the outgrowth of the necessity of providing against sham sales and devices for evading the penalties of these liquor laws, and were only intended to affect those who make commerce of intoxicating liquors, and provide places and means for persons to supply themselves with such liquors. In this case the treating of Cruse by defendant was a mere incident of their friendly meeting on that occasion. There was nothing sinister or mercenary about it. He could have had no other object than that of cementing the friendship between himself, Cruse and Mowery by a practice common among men, as was the case with Cruse in treating Aden and Sensmeyer. Legally he was guilty of no wrong and no negligence.

In all the cases heretofore brought under the provisions of the Dram Shop Act, we believe the defendants were dealers in or manufacturers of intoxicating liquors and therefore amenable to the act, as it was for the regulation of their business (and for no other purpose) the act was passed. In

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this case the defendant was not a dealer in or manufacturer of liquor and not connected with the business in any manner.

Messrs. W. S. DAY, P. E. HILEMAN and D. W. KARRAKER, for appellee.

Appellant's counsel claim that Sec. 9 of the Dram Shop Act was not intended to reach any persons except those engaged in the liquor traffic. It would be sufficient answer to the logic of this objection to ask the question, what difference is it to appellee whether her husband's death was caused by liquor given to him by *friends* or by a saloon keeper? But it is answered legally by referring to the statute itself. The 9th section commences with these words: "Every husband, wife, child, parent," etc., and in naming who the recovery could be had against, says: "Against *any person or persons* who shall, by selling or giving intoxicating liquors, have caused the intoxication in whole or in part," etc. The wording of Sec. 9 is similar to the wording of Sec. 6, with reference to sales to minors, which has been construed by the Supreme Court in case of Johnson v. People, 83 Ill. 431, where the word "whoever" is construed to apply to others than dramshop keepers, and the word "whoever" can not be said to be more comprehensive than the words "any person" as used in Sec. 9; this case seems to entirely overrule the case of Albrecht v. People, 78 Ill. 510.

Aden went seven and a quarter miles to get to Mill Creek. He took a jug of liquor along. Appellant claims that his business was to go to Elco with Charley Sackett, but the first thing he does is to call for Cruse and get a stable and unhitch his horses and take the harness off of them and then "treat the boys" and go to the voting place. This was general election day. Appellant himself says: "I stayed around awhile and told the boys that I was for Frank Neibauer and the Stock Law. After being with Cruse and others around there several hours and getting Cruse thoroughly drunk, he leaves him under a tree about 100 yards from Mill Creek bridge, and drives back to Dongola without going to Elco or transacting any business with Sackett. He left his own precinct and drove six

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miles from his voting place in order to "cement the friendship between himself and Cruse and Mowrey" and declare himself for "Frank Neibauer and the Liquor Law." He was there on general election day at the polling place with liquor, giving it away, in violation of the laws of the State of Illinois, and there was no friendly treating about it. It was an electioneering scheme.

GREEN, J. Appellee brought suit to recover damages for injury to her means of support, alleged in the declaration to have been caused by appellant giving intoxicating liquor to her husband, whereby he became intoxicated, and being in a state of intoxication so caused, and by means thereof being in such mental and physical condition as to be unable to ride, guide and manage his horse, he fell off his horse upon the ground, and thereby received fatal wounds and injuries, from which he in eight days afterward died, etc. The declaration concludes, "and by force of the statute in such case made and provided, an action has accrued to her against defendant, for the recovery of her said damages in the premises, and therefore she brings her suit, etc." The jury found defendant guilty, and assessed plaintiff's damages at \$800. Defendant's motion for a new trial was overruled. The court rendered judgment on the verdict, to reverse which judgment this appeal was taken. It appears from the evidence, appellant and Cruse, the deceased, were farmers and friends. About 11 o'clock in the morning of election day, in November, 1884, appellant drove into the village of Mill Creek, inquired for Cruse of a person who was a witness on the trial, and who found Cruse, came with him to appellant, and the latter asked Cruse to get him some place where he could put up his team. Cruse did so, and together with the witness rode with appellant in his buggy to the barn, and after putting up the team there appellant invited the two to drink with him out of a flat bottle or flask containing less than a pint of apple brandy; all three drank, and after talking together there a short time, upon the invitation of appellant they drank again, finishing the contents of the flask. These two drinks were the only ones

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given Cruse by appellant. Cruse was not then intoxicated. The three then left the barn and went to the polls together. It further appears Cruse was in company with other persons at Mill Creek at an early hour the same morning, when whisky was being drank, and between 8 and 9 o'clock same morning he had a quart bottle of whisky, and a witness upon his invitation took a drink out of it, Cruse remarking he had got the whisky the day before to treat his friends. Shortly after 12 o'clock, same day, Cruse again met appellant and another person, invited them to go with him to the barn where the team of appellant had been left, which they did, and there Cruse produced a quart bottle partly filled with whisky, and each took a drink out of it, upon his invitation. This was the only drink taken there. Cruse was then intoxicated. The team was then hitched to the buggy, all three got in, appellant drove out of the village about three quarters of a mile, turned around, came back, and Cruse and witness left the buggy and separated from appellant, who drove home and saw them no more. Shortly after Cruse got out of the buggy he said the liquor had made him sick, and vomited, after which he said he was better and proposed to go home. His horse was then brought, he was assisted to mount it and rode off evidently intoxicated. After riding a short distance his horse started and ran away, and either stumbled or stepped on the halter strap. Cruse was thrown or fell upon the ground, and was so injured as to cause his death within a few days.

We omit the evidence concerning the support furnished appellee by the deceased, and touching his habits and ability to work, as also the property he left, but deem the evidence sufficient to show appellee was injured in her means of support by the death of her husband; and we think also, that the jury might fairly infer from the evidence the two drinks given deceased by appellant contributed to cause the intoxication, and that such intoxication was the proximate cause of the accident which resulted in the death of Cruse; nor were the damages assessed excessive; but there yet remains to be decided the graver question. Had appellee, under the statute, upon the facts proven, a right of action against appellant, he

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not being a dram-shop keeper, or engaged directly or indirectly in the traffic of selling intoxicating liquor, at the time he gave Cruse the two drinks? Such right of action appellee claims is given by this 9th section of the Dram Shop Act. "Every husband, wife, child, parent, guardian, employer or other person, who shall be injured in person or property, or means of support, by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action in his or her own name, severally or jointly, against any person or persons who shall by selling *or giving* intoxicating liquors have caused the intoxication in whole or in part of such person or persons, and any person owning, renting, leasing or permitting the occupation of any building or premises, and having knowledge that intoxicating liquors are to be sold therein, or who, having leased the same for other purposes, shall knowingly permit therein the sale of any intoxicating liquors that have caused in whole or in part the intoxication of any person, shall be liable severally or jointly with the person or persons selling or giving intoxicating liquors as aforesaid, for all damages sustained, and for exemplary damages, * * * and the unlawful sale or giving away of intoxicating liquors shall work a forfeiture of all rights of the tenant under any lease or contract of rent, upon the premises where such unlawful sale or giving away shall take place * * * ." It has not been generally understood by the profession in this State that this section was intended to give a right of action to recover damages for the injuries mentioned, against others than dram shop keepers, their agents or servants, and those owning premises where intoxicating liquors were sold, and for this reason, probably, no suit has been brought precisely similar in character to this, and taken up to the Supreme Court for final determination. Hence we have not the benefit of the light which an opinion of that court would give us in a case exactly like this, but must give a construction to this section justified by the title of the act, the apparent purpose of its provisions, and the language used in said Sec. 9. We find the title of the act is "Dram Shops," and it is further entitled "An act to provide for the

licensing of, and against the evils arising from the sale of intoxicating liquors." The title would indicate the traffic in liquor as carried on in dram shops to be the subject-matter intended to be regulated and controlled by this act; and the several sections thereof, we think, carry out such purpose. Sec. 1 defines a dram shop, and what is meant by intoxicating liquors. Sec. 2 prescribes the penalty for selling without a license. Sec. 3 how a license may be granted. Sec. 4 the form of license, rights under it, and for its revocation. Sec. 5 requires dram-shop keepers to give a bond, fixes the amount and conditions of it, and provides for suit thereon. Sec. 6 provides for the punishment of "whoever by himself, his agent or servant," shall sell or give intoxicating liquor to a minor. Sec. 7 declares places to be nuisances, where intoxicating liquors are sold in violation of the act, provides for the punishment of those keeping such, and for the abatement thereof. Sec. 8 provides that every person who, by the *sale* of intoxicating liquor, with or without license, shall cause the intoxication of any other person, shall pay a reasonable compensation and \$2 per day additional, to any one taking charge of, and providing for such intoxicated person. Sec. 10 provides what property shall be liable to execution for the payment of *any judgment for damages and costs* recovered against any person in consequence of the *sale* of intoxicating liquors *under* Sec. 9, and for proceedings to enforce payment of such judgment. Sec. 11 gives jurisdiction to Justices in certain cases. Sec. 12 provides for indictment. Sec. 13 provides, "The *giving away* of intoxicating liquors, or other shift or device to evade the provisions of this act, shall be held to be an *unlawful selling*." Sec. 14 relates to indictment and evidence. Sec. 15 provides that it shall be no objection to a recovery under the act that the offense is punishable under city, village or town ordinance. Sections 16, 17 and 18 comprise the "Harper Act," and need not be here repeated. The sections cited seem to have been so worded as to exclude doubt that the scope and purpose of the act was limited to providing in what manner the traffic in intoxicating liquors would be permitted, who might engage in such traffic, under

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what conditions and restrictions, the penalties incurred for a violation of the provisions of the act, and the mode of enforcing them, also providing a remedy for injuries resulting from the sale or gift of intoxicating liquors by dram-shop keepers, their agents or servants, in the course of business, and the 9th section fairly construed as a part of the act does not include persons other than those engaged in the traffic, or one who sells or gives away intoxicating liquor without license for some profit or personal advantage, as persons against whom a right of action is given. After giving a right of action severally or jointly against "any person or persons selling or *giving* intoxicating liquors causing intoxication, etc.," and in connection therewith, it is provided, "the person who rents *the premises* with knowledge that intoxicating liquors are to be sold therein, or knowingly permits therein the sale of such liquors that have caused the intoxication of any person in whole or in part, shall be severally or jointly liable with the *person* or *persons* selling or giving intoxicating liquors *as aforesaid*, for all damages, etc." This provision defines the person or persons with whom the landlord or owner of the premises is made jointly liable to be the person or persons selling or giving intoxicating liquors *in the premises* where the sale of such liquors is carried on, and against whom a right of action is given in said section, and plainly indicates the person or persons intended are those only engaged in said traffic; but continuing, the section further provides, "the unlawful selling or *giving away* of intoxicating liquors shall work a forfeiture of all rights of the tenant under any lease or contract, upon the premises where such unlawful sale or *giving away* shall take place." The "giving" in this part of the section mentioned is evidently (like the same word when used in the first part of Sec. 9) intended to mean, by one engaged in the traffic of a dram shop, because no other could be a tenant guilty of unlawful sale or giving away, whereby such forfeiture could be incurred. Sec. 10 also supports our construction. It provides what property shall be liable to execution for the payment of a judgment recovered against any person under Sec. 9, and to satisfy such judgment subjects to sale the premises

used or occupied for the sale of intoxicating liquors by the person against whom such judgment is rendered. Can it be fairly insisted this section does not further define the person intended by Sec. 9 to be made liable for damages resulting from the sale or giving intoxicating liquors, to be a person engaged in the traffic of a dram shop or who, as a part of his business, sells intoxicating liquor, as for instance a druggist? Sec. 13 may also properly be referred to in this connection; it provides, "The giving away of intoxicating liquors, or other shift or device to evade the provisions of this act, shall be held to be an unlawful selling." As used in this section the word "giving," is not to be construed as meaning the mere act of giving away intoxicating liquors by any person, as such construction would leave the context "or other shift or device to evade the provisions of this act," without significance; it means the act of giving in a manner to evade the law, by one not having a license—for instance, giving away the liquor, and at the same time selling some valueless article, taking pay for the latter only—and applies solely to those engaged in the liquor traffic. The Legislature surely did not intend that a person not engaged in that business, because he did not have a license, should become liable to fine and imprisonment, as for unlawful selling, for giving away a glass of wine or liquor to a friend or guest, and if the meaning and application we have given the word as used in Sec. 13 is correct, it would seem, for a similar reason, to have a like meaning and application when used in Sec. 9; there the phrase is "selling or giving." If others than dram-shop keepers, their agents and servants, were intended to be included, the word "selling" is superfluous. The evident purpose for which the word "giving" is inserted is to prevent a person engaged in the traffic from escaping the liability by resorting to the device of giving the intoxicating liquor, and as part of the same transaction selling some other thing and receiving pay for it; furthermore, if Sec. 9, by a fair construction, embraces all persons, and is not restricted in its operation to those engaged in the liquor traffic and "*giving away intoxicating liquor*" by any person, is to be held an *unlawful selling* under

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Sec. 13, a tenant of a dwelling house, who, in the presence of, and without objection of his landlord, in such house, gives (as in this case) two drinks of intoxicating liquor to a friend, which does not produce intoxication, and the latter shortly after leaves and drinks elsewhere until intoxicated, and injures a person by reason of such intoxication, the tenant and landlord would be jointly liable to the injured party, if a jury should find the two drinks contributed to such intoxication, and in such case the tenant would be liable also to a forfeiture of his lease and eviction from the leased premises, the landlord would become so liable for *permitting* the giving of the drinks in the leased premises, and the tenant would incur the additional penalty of forfeiture and eviction, for the *unlawful giving away* of intoxicating liquor. We do not think the Legislature intended Sec. 9 to be given such construction, or intended the penalties and provisions contained in the Dram Shop Act, to apply to persons not directly or indirectly engaged in the liquor traffic, or one who for a consideration, pecuniary or otherwise, gives intoxicating liquor to another to drink, and if this is so, the right of action given by said section to one injured in her means of support, in consequence of the intoxication, habitual or otherwise, of any person, is not intended to be given against a person who, in his own house or elsewhere, as an act of courtesy or politeness, treats a friend to a glass of intoxicating liquor, without any purpose of gain or profit. However pernicious and prolific of evil the custom of treating, as it is termed, may be deemed, we have not the power to legislate in respect thereto for the purpose of suppressing such custom, and in the absence of a statute giving a right of action against one who treats another, or providing means for preventing such act, we can not effect such purpose by giving a wrong or unreasonable construction to a law in force. We have said no precisely similar case to this has been before our Supreme Court, but in the case of *Albrecht v. The People*, 78 Ill. 510, the defendant was found guilty of a violation of the 6th section of the Dram Shop Act, and appealed from the judgment rendered against him. It appeared that he carried on a brewery but kept no dram shop.

One Dewey, a minor, called with others to see defendant about some business, and all were invited by defendant to drink beer furnished by him—they accepted the invitation and all drank. The court in the opinion say, this was not an act the statute intended to punish, and was a mere courtesy which the law was not designed to reach, and further say, “the statute is highly penal in its provisions, and according to well recognized rules, must be construed strictly, keeping in view the great central object the Legislature had in its enactment, and the evils to be prevented. The title of the act is Dram Shops, and every section is leveled against them, not with a view to their suppression, for they are licensed to sell intoxicating liquors. The provisions of the act are aimed at such.” The judgment below was reversed, and no member of the court dissented. The construction we have given this act, is in harmony with the views expressed in that opinion, and is not in conflict with the decision or opinion in *Johnson v. People*, 83 Ill. 431. Johnson was indicted under the 6th section for selling to minors, and set up in defense that he sold no liquor, but only assisted in making change for those who did sell; in the opinion it is said, the language of Sec. 6 is sufficiently broad to embrace all other persons as well as the keepers of dram shops, and that defendant was present assisting in selling, but it is also said in the opinion, “it is not necessary to now determine whether a person would incur the penalty by giving liquor as an act of hospitality at his own house—that question is not before the court; the question is, whether a person having or not having a license to keep a dram shop, may *sell* intoxicating liquors to minors, and we think it is manifest they can not, without incurring the penalty provided by law.” This decision does not overrule the *Albrecht* case, or conflict with the construction we have given the 9th section and as such construction would necessarily preclude appellee from maintaining her action against appellant. This opinion need not be lengthened by a criticism of the instructions excepted to, and the judgment of the Circuit Court must be reversed.

Reversed.

Kepley v. Schmidt.

HENRY B. KEPLEY

V.

CARL SCHMIDT.

Negotiable Paper—Want of Consideration—Bona Fide Holder.

In an action upon a promissory note by a *bona fide* holder, the defense of want of consideration can not avail.

[Opinion filed March 9, 1887.]

APPEAL from the Circuit Court of Effingham County; the Hon. WILLIAM C. JONES, Judge, presiding.

Mr. S. F. GILMORE, for appellant.

No counsel appeared for appellee.

Per Curiam. Action upon promissory note by the assignee against the maker, with defense of failure of consideration, with notice to plaintiff. An examination of the record discloses no error of the court in admitting or excluding evidence, nor in giving or refusing instructions, so far as error is assigned in that behalf. The evidence, however, while tending to show a want of consideration for the major part of the note, utterly fails to establish the fact that plaintiff bought the note with notice of such defense. He appears to be a *bona fide* assignee for value before maturity, and as such, was entitled to recover. The verdict is therefore wrong, and the judgment founded thereon will be reversed and the cause remanded for a new trial.

Reversed and remanded.

FARMERS AND MERCHANTS NATIONAL BANK
V.
JOHN S. BARTON AND WILLIAM L. BALLINGER.

*Usury—Stipulation in Note for Attorney's Fee—Valid on Its Face—
Indemnity—Reasonable Compensation, Extent of Recovery.*

1. Usury is not to be presumed but must be pleaded and established unless upon the face of the contract it is apparent.
2. A stipulation contained in a note for attorney's fees where suit is brought, upon default in payment, is not usurious upon its face.
3. Such a stipulation, being a contract for indemnity only, it seems that the plaintiff can recover only a reasonable compensation for the services of his attorney, not in excess of the limit of the stipulation.

[Opinion filed March 9, 1887.]

APPEAL from the Circuit Court of Fayette County; the Hon. JESSE J. PHILLIPS, Judge, presiding.

This action is based upon a promissory note as follows:
\$300.00. VANDALIA, ILLS., Dec. 10th, 1884.

Six months after date, for value received, we or either of us promise to pay to the order of the Farmers and Merchants National Bank of Vandalia, three hundred dollars with interest at eight per cent. after maturity. If this note is not paid when due, we agree to pay an attorney's fee of thirty dollars, if placed in the hands of an attorney for collection.

JOHN S. BARTON,
W. L. BALLINGER,
BENJAMIN BUCKMASTER.

The declaration avers that the note not being paid at maturity, the plaintiff placed it in the hands of one B. W. Henry, an attorney at law, for collection by suit in the Circuit Court of said county, and then paid him the \$30 attorney fee, named in said note. Two of the defendants being served with process suffered a default, and thereupon the court assessed the damages at the principal sum in the note, and eight

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per cent. interest thereon after maturity of the note, but refused upon motion of the plaintiff to allow the attorney's fee provided for in the note and paid by the plaintiff. The averment in the declaration above noticed was also proved upon the assessment of damages by the testimony of the cashier of the bank. The plaintiff excepted to the action of the court in refusing to allow such fee as a part of the damages, and appealed to this court. In this court a stipulation has been filed that the court might consider the case as though a plea of usury had been filed in the court below.

Messrs. B. W. HENRY and S. A. PRATER, for appellant.

Messrs. WEBB & Cox and W. M. FOLGER, for appellee.

PILLSBURY, J. The only question presented by this record or the briefs of counsel is, whether the stipulation for attorney's fees contained in the note is void *per se*. It is claimed that it is usurious, against the policy of law and without consideration. Such stipulations in notes and mortgages have been before the courts of several of the States, and the decisions thereon are somewhat conflicting. They have been held void in Ohio, Nebraska, Kentucky and Michigan. *State of Ohio v. Taylor*, 10 Ohio, 378; *Dow v. Updike*, 11 Neb. 95; *Bullock v. Taylor*, 39 Mich. 137; *Witherspoon v. Musselman*, 14 Bush. 214.

One of the principal grounds upon which the decisions in Michigan and Kentucky rests, seems to be that by the statutes of those States an attorney's fee, to be taxed as costs, is provided for, and the amount that the court shall allow is fixed, and it is not competent for the parties to contract for a different amount of taxable costs. In Indiana, Tennessee, Iowa, Pennsylvania, Oregon and Texas, the courts have taken a different view and held such agreements valid. *Smith v. Silvers*, 32 Ind. 321; *Johnson v. Crossland*, 34 Ind. 512; *Tuley v. McClung*, 67 Ind. 10; *Parham v. Pulliam*, 5 Cold. 497; *Williams v. Meeker*, 29 Iowa, 292; *McGill v. Griffin*, 32 Iowa, 445; *Huling v. Drexel*, 7 Watts, 126; *Finler v. Finler*, 94 Pa. St. 372; *Peyton v. Cole*, 11 Oregon, 39; *Miner v. Exchange Bank*, 53 Tex. 559.

These latter cases find support in our own decisions so far as the courts have been called upon to determine the question. Thus, in *Dunn v. Rodgers*, 43 Ill. 260, where the note and mortgage provided for the payment by the debtor of an attorney's fee of \$10 if suit should be brought, it was held that such sum was properly included in the decree foreclosing the mortgage, and in *Clawson v. Munson*, 55 Ill. 394, where the question seems to have been more directly presented, the court held that the attorney's fee, stipulated in the mortgage to be paid by the debtor, could be included in the decree, and in answer to the suggestion of counsel that the case was an oppressively hard one, the court replies: "We can only say, that the appellants provided by their express agreement in the mortgage for all the consequences that have followed in case of default in prompt payment, and that they could have avoided all the hardships by paying the notes at maturity. It is not in the power of the court to relieve a party from the force and consequences of his own agreement." So in *McIntire v. Yates et al.*, 104 Ill. 491, the point was made that the decree was erroneous in that it included a solicitor's fee of two per cent. upon the amount found due; but the court held that the decree was proper and that the case could not be distinguished from that of *Clawson v. Munson*, 55 Ill. 394. Besides these cases decided in equity, it has been expressly held that it was not error to include an attorney's fee where judgment was confessed under power of attorney, if the power was broad enough to include such damages (*Ball v. Miller*, 38 Ill. 110), and such is believed to be the uniform holding in cases of that character. Here then we find that our Supreme Court, both at law and in equity, has sustained judgments and decrees which included an attorney's fee, where the same has been expressly agreed to be paid by the debtor, in case of his failure or neglect to pay his indebtedness, and in consequence thereof it became necessary for the creditor to incur expense in asserting his rights under the contract in the courts of law or equity. If such agreements were void upon their face, as being opposed to the statute against usury or the general policy of the law, such decisions could not have been made, and these cases are

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therefore to be considered as adjudications that such stipulations are not open to the objections urged. If opposed to the policy of the law, they would be equally void whether sought to be enforced either at law or in equity, as their validity could not be made to depend upon the forum, where their effect was to be determined. The cases of Nickerson v. Babcock, 29 Ill. 497, and Easter v. Boyd, 79 Ill. 325, simply hold that where the contingency upon which the attorney's fee shall become due and payable does not arise until suit is brought, such fee can not be included in the judgment in the same suit at law; but at the same time there is a strong intimation in the Boyd case that if the stipulation had provided for the payment of such fee, upon default in payment of the principal and interest at maturity it might have been recovered. From these decisions of our Supreme Court, most fully supported by the rule in the other cases, from other States above referred to, we think that the stipulation in the note in suit is sustained by the weight of authority bearing upon the question. Independent of authority we arrive at the same conclusion upon principle. As to the objection that the stipulation makes the contract usurious, it can be said that usury is not to be presumed, but must be pleaded and established by the proofs, unless upon the face of the contract the usury is apparent. In this case, treating it under the stipulation filed in this court, as though a formal plea of usury was in the record, no proof was made that the stipulation was intended as a device to evade the usury laws. Standing by itself, and giving to the language employed its usual and natural signification, it would seem that the intention of the parties was, that if by the default or neglect of the defendants to pay the note at maturity it became necessary for the plaintiff to employ an attorney at law to collect the note, they would reimburse the plaintiff for all expenses thus incurred, to the extent of \$30, the amount named as the limit of the indemnity for which they should be liable. It does not contemplate nor provide that the payee of the note can or shall reserve to itself any pecuniary benefit or compensation out of the amount, for the use of the money loaned, nor does it appear to be in the nature of a pen-

alty for the non-payment of the note at maturity, and, consequently, is not within the prohibition of section 6, of the statute relating to interest. The condition upon which the right to exact payment of attorney's fees rests, does not alone depend upon non-payment at maturity, but only attaches when thereafter the note is placed in the hands of an attorney for collection, and the payee has thereby incurred a liability in consequence of the neglect of the makers to comply with their contract. The note might remain unpaid for months, or years, even, but if not placed in course of collection through the hands of an attorney, the debtor could discharge the debts at any time by the payment of the principal sum with the agreed rate of interest. That part of the agreement relating to the non-payment at maturity, is for the benefit of the debtor, in that it prevents the creditor from putting it in the hands of an attorney before due, and thereby incur a liability to be charged against the maker of the note. In other words, the liability to pay attorney's fees does not arise because the note is not paid when due, but only when, thereafter, the plaintiff shall become liable for an attorney's fee in order to enforce collection of the note by the aid of an attorney, either with or without litigation. It being a contract for indemnity only, the plaintiff would not be allowed to recover more than a reasonable compensation for the services of his attorney, to be limited by the sum agreed to be paid, and in case of a special contract for the collection of the note he would be limited to his actual expenditure, even if less than the services would be reasonably worth. Thus construed we fail to see wherein such stipulation renders the note usurious, or wherein it is opposed to the policy of the law. It gives to the creditor his money loaned and the interest thereon only, and this it is the policy of the law to give him. If, however, the provision is inserted for the purpose of evading the laws against usury, and thus be made to appear without doubt, the penalty prescribed by the statute would attach to the transaction. We look upon the provision as one for the recovery of special damages that the parties contemplate may arise from a breach of the contract by the defend-

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ant, which, though not recoverable under the general rule for the admeasurement of damages in ordinary actions, because not the necessary and natural results of the breach of the contract complained of, are nevertheless entirely competent for the parties to contract for, and thereby allow the plaintiff what in equity and good conscience he ought to receive in satisfaction of his contract, the money loaned and the interest thereon agreed to be paid. The incurring of the liability to pay attorney's fees, caused by the wrongful act of the defendant in not complying with his contract, is a sufficient consideration to support the agreement for indemnity. We are therefore of the opinion that the stipulation is not void upon its face and that the court below should have enforced it as the contract of the parties and allowed the attorney's fees paid by the plaintiff as a part of the damages in the case, as the proof shows that the payment made and liability incurred therefor occurred before the bringing of this suit and could therefore be properly included in the judgment as a part of the damages sustained by the plaintiff through the neglect of the defendants to comply with their contract. To the end that this may be done, the judgment below will be reversed and the cause remanded with directions to the court below to render judgment in this cause for the amount of the note and interest, according to its terms, and for the further sum of \$30 as attorney's fees, as provided in the note, such sum having been actually paid, and the presumption being from the contract of the parties, in absence of proof to the contrary, that such fee was a reasonable one. *Smiley v. Meir*, 47 Ind. 559.

Reversed and remanded.

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CHICAGO & ALTON RAILROAD COMPANY

v.

SYLVESTER McDONALD.

21	409
52	563
21	409
65	540

Railroads—Duty to Prevent Collisions—Liability for Personal Injury to Employee—Conductor and Engineer of Construction Train and Shoveler, Fellow-Servants—Company not Liable for Injury to Shoveler.

1. Railroad companies are by the law held to a high degree of care and diligence in the adoption and enforcement of all needful rules and regulations to avoid collisions of trains, and thereby promote the safety of their employes and others.

2. The conductor and engineer of a construction train and a shoveler employed on such train, are fellow servants engaged in the same branch of service, and their common master is not liable for an injury to the shoveler through the negligence of the conductor and engineer, or either of them.

3. In the case presented, it is *held*: That the collision causing the injury complained of was due to the negligence of the conductor, superinduced by the inexcusable carelessness or wilfulness of the engineer; and that, under all the circumstances, it was not reasonably necessary to prevent the collision for the train dispatcher to notify the conductor of the construction train that the regular passenger train was late, it being the duty of the latter, under his working orders and the general rules, to wait until the passenger train had passed.

[Opinion filed March 9, 1887.]

APPEAL from the City Court of East St. Louis; the Hon. WILLIAM P. LAUNTZ, Judge, presiding.

Statement of the case by WILKIN, P. J. On the morning of May 13, 1886, appellee, who was employed by appellant, took passage with other laborers on a construction train of appellant, consisting of locomotive engine and caboose car, at Higbee, Missouri, a station on the line of appellant's railroad. This crew of laborers had over them a foreman named Cavanaugh, also employed by appellant. The train was in charge of a conductor, O. F. Culbertson, who controlled and directed its movements. On the morning in question, about 7 o'clock A. M., conductor Culbertson received from F. M. White, the

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chief train dispatcher, the following order for the movement of his train on said day, viz:

“SLATER, Mo., May 13, 1885.

To Paine and Engineer Culbertson and Engineer Wright and engineer at Highbee; Paine, Culbertson and Wright, engines 204, 194 and 200, will work between Highbee and Clark, as three wild trains, and make arrangements to keep out of each other's way, and work until 7.40 P. M. regardless of train 74, Conductor Gibbs, engine 168; all other trains due have passed.”

He was also supplied with a copy of the general rules of appellant, which were introduced by appellee, and by which he testifies he was governed; among which are the following:

Rule 1 gives trains going north and east absolute right of road over all trains going south or west, of the same class. Prohibits trains going north or east leaving stations or passing places where by time table they should pass trains of same class, until five minutes after its own time, per table; the five minutes to be observed at every succeeding station until the expected train is passed.

Rule 5. Provides that “the safe side must always be taken in cases of the least uncertainty”; that trains are to be run under the direction of the conductor, except when his directions conflict with train orders, etc.

Rule 8. “Irregular trains, running under special telegraph orders, must be run with great care.”

Rule 20. “Division superintendents and appointed train dispatchers are alone authorized to move trains by telegraph.”

Rule 28 is as follows: “Conductors of construction trains must notify the train dispatcher every evening, from the nearest telegraph office, where they desire to work the following day, and obtain working orders, a copy of which the engineer must have before starting out to work. Those orders, unless otherwise stated, will be in force from 6 A. M. until 8 P. M. only. Conductors must ascertain also the positions of all trains, and learn positively that all trains due during the night have arrived or passed, and under no consideration pass the limits given without permission.” This train went east some eight

or nine miles, near Clark station, and proceeded to work on a new piece of road-bed, intended to straighten the track, the men shoveling on the cars under the directions of their foreman and the conductor moving the train as directed by him. The dirt, however, was not moved off the new line that day, and hence the train only used the main line in going to and attempting to return from the work, its headquarters being at Higbee. This train, with the same conductor, had been engaged in this work two months. About 6 o'clock in the evening the conductor started his train, with appellee and other laborers aboard, back to Higbee, but had only gone a short distance on the main line when he collided with passenger train No. 47, east bound, some six hours late. Appellee, to avoid the consequences of the collision, jumped from the caboose of the work train, thereby receiving the injury for which he brings this suit. The injury complained of is hernia, and the evidence was sufficient to justify the jury in finding that it was occasioned by the fall in jumping from the car, to avoid the wreck of the two trains; also that the injury is permanent, and to some extent disables him for the performance of manual labor. In the first count of his declaration he bases his right to recover on the allegation that his injury resulted from the negligence of the servants of appellant in running and operating the said construction train; in the second, that the collision of the two trains and his consequent injury was caused by the negligence and fault of the train dispatcher; in the third, that the injury resulted from a failure on the part of appellant to have an office or stopping place for trains at the junction of the new work with the main track. The train dispatcher for this division of appellant's road had his office at Slater, Missouri, west of the place of the collision. About 8:30 A. M. that day he knew that No. 47 was being delayed by a wreck west of his station, and about 9:40 A. M. he sent an order to trains east giving all trains the right to use four hours on the time of train 47. This order was delivered to Paine and Wright (through Conductor Young, of train No. 99), the other two conductors of construction trains leaving Higbee that morning, but not to Culbertson. Afterward an-

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other order was sent giving certain trains five hours and thirty minutes on the time of No. 47, but it was not sent to either of the three construction trains. It does not definitely appear from the evidence whether Paine and Wright were on the new work exclusively or not, but the train dispatcher testified that the reason he sent the order giving four hours on the time of No. 47 to them, and not to Culbertson, was because they were working on the main line, and could not occupy it against passenger trains without special telegraph orders, while his work was on a portion of the new line not used by regular trains.

Appellee introduced Conductor Culbertson, and as to his conduct in moving his train out on the main line against No. 47, he was interrogated and answered as follows: Do you know when No. 99, Young, conductor, passed over the main line? Answer. I do. Were any of your men at the main line, when the train went, to watch for orders? Answer. Yes; I was there myself. * * * I should say it was between 9 and 10 o'clock. I received no signal more than throwing up the hand. * * * The fireman and myself went up to the junction when train No. 75 passed. It was a freight train and it was about 12:20 or 12:25 o'clock. What has been your custom previous to the 13th of May in regard to the time of returning to Higbee after work? No matter where we were, at 6 o'clock in the evening, as soon as the men quit work, we went to Higbee every night. * * * The distance between the junction and Clark is between one and three quarters and two miles over the crooked road. Across it was about a mile. I did not go to Clark that evening to the telegraph office to get orders to find out whether all trains were on time and had passed, because I would be in just as bad shape to go to Clark as the other way, because I never protected myself against trains coming between Clark and the junction, because I had no occasion to go to the junction. The only three trains I had to protect myself against were coming east; for that reason I never paid any attention to trains the other way. I knew I had to guard in and out. A man running a work train has to fight in and out. When I took a notion to go

ahead of a train I didn't care if it was ahead or behind, if it was going the same way, when through we would go. We had some general rules issued by the company. He identified the rules and was asked: Did you have any other rules and regulations except the general rules that appear on this table? Answer. No, sir; only telegraph orders. Did you have a copy of this? Answer. Yes, sir; I have been railroad-ing about fourteen years—running a train about nine years. Now I will ask you this question: When a passenger train, having the right of the road, is behind time according to the time table, whether it is customary and usual to send tele-graphic orders to all trains running in an opposite direction, giving them time on the passenger train or notifying them that the train is behind time? Answer. Yes; it is, on all roads. It is a means of safety and of preventing collisions. The telegraph is continually used in the running of trains; very seldom a train goes over the road or half way over the di- vision without getting a pocket full of them. If I had re- ceived the same telegraph order as the one sent to Conductors Paine and Wright on that day the collision would not have occurred. On cross-examination he testified: I received no order from the superintendent that day. I received no verbal orders; my engineer received none to my knowledge. What means had you of knowing whether train No. 47 had passed? Answer. The only means was going over there to see. Those were the means you had always adopted before that day? An- swer. Yes; there is a rule that requires you to keep out of the way of regular trains. How do you do that? Answer. Get on the side track and wait. How long? Answer. Wait twelve hours if I can't get any help. And if you don't get any help in twelve hours, how long? Answer. Twelve hours and five minutes. Then how much longer? Answer. No longer. In this case how long did you wait after 47 was due? An- swer. Six hours. You waited six hours? Answer. Yes, sir. You knew the time 47 was due? Answer. 12:05. How long were you to wait? It was your duty as a careful con- ductor to wait until you ascertained whether 47 had passed. This was not a switch? Answer. If 47 would be twelve

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hours late I would lose my right. How long would you have to wait after it was due for it to pass? Answer. I said I would have to wait indefinitely because I had lost my right. You would have to wait until you had ascertained physically whether it had passed or not? Answer. Yes sir. If she was due at 12 o'clock in the day time and you hadn't found at 6 or 7 o'clock that she had passed or have reason to believe it you would not have gone out? No sir, if I hadn't reason to believe she had passed. What reason had you for believing she had passed? Answer. The engineer told me he saw her go by. What engineer told you so? Answer. My engineer, the engineer working with me. Was it not your duty to go up and see that she went by? Answer. It was my duty to go or send some one. That was your means of finding out whether No. 47 had passed or not? Answer. That was the only way, yes, that was the only way I had of knowing positively unless they sent me an order; * * * in the absence of receiving a telegraphic order or any other order it was my duty to be out there or send some one. I sent my engineer and he reported to me that he saw her go by about on time; that caused me to move out; afterwards I found out I was mistaken. Without that statement of your engineer you would not go out for a week. Answer. No, sir; I did not receive any telegraphic permission to move out that day. * * * I was working at the time of this accident under these general rules already in evidence. * * * That day I was working under rule 28; under this rule in the absence of any telegraphic orders I had to see the other train or have one of my men under my control in whom I had confidence, to tell me it had gone by; * * * failing to get an order would not have caused the accident unless I thought 47 had passed. * * * There was no work for me to do that day between the junction and Higbee. This order, 182, a working order, is the only one I received that day. On re-direct examination he was asked, under this order what were your duties? Answer. My duties were to work the main line in the way I saw fit between Higbee and Clark, to keep out of the way of trains. Regular time card trains were the

ones I had to keep out of the way of. Now in case one of the regular trains was late and had lost its place on the time card, was there any way by which you could know that it hadn't passed or to know in any way to keep out of the way of that train except a telegraphic order? Answer. No, sir, not without it had lost the right to the track. No. 47 had not lost its right that day. No instructions to the jury were asked or given on behalf of appellee. The jury returned a verdict in favor of appellee for \$6,260. Motion for new trial was overruled and judgment rendered for the amount of the verdict and costs.

The case comes here by appeal.

Mr. J. L. HIRE, for appellant.

The refusal of the court to grant a new trial was erroneous, because the conductor and engineer, through whose carelessness and disobedience of orders plaintiff was injured, were his fellow-servants, working under a common master, and co-operating with each other in doing a particular piece of work.

The principal is not liable to one servant for the carelessness of another servant where both are engaged in a common employment, if the principal has used care in the selection of the fellow-servant. *Honner v. I. C. R. R. Co.*, 15 Ill. 550.

Where competent servants have been selected to perform a duty, one of them can not recover against the master for the carelessness of a fellow-servant, and it will be understood that each servant who engages in a particular business calculates the hazards incident to it, and contends accordingly. *I. C. R. R. Co. v. Cox*, 21 Ill. 20; *Moss v. Johnson*, 22 Ill. 633; *C. & A. R. R. Co. v. Keefe*, 47 Ill. 108; *C. & A. R. R. Co. v. Murphy*, 53 Ill. 336.

The engineer, brakemen and shovelers employed on a construction train are all co-servants, engaged in the same branch of service, and a shoveler who is injured through the negligence of the engineer or trackmen can not recover from their common employer for such injury, if the employer has used due diligence in their selection. And there was no claim made or proved that the employer was guilty of negligence in

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selecting its employes who were working with the plaintiff. *St. L. & S. E. R. R. Co. v. Britz*, 72 Ill. 256; *T., W. & W. R. R. Co. v. Durkin*, 76 Ill. 395.

We have cited these cases to show how they have by evolution led to the decision in the *Abend* case, 111 Ill. 202, where the court is at last called upon to decide, not only what facts establish the relation of fellow-servants of a common employer, but also what the facts were in the case.

Messrs. FLANNIGEN & CANBY, for appellee.

The collision and consequent injury to appellee were occasioned by the negligence and fault of appellant's train dispatcher in failing to send to Conductor Culbertson a proper and necessary order, notifying him that passenger train No. 47 was behind time, and that for such negligence the company is liable. *C. B. & R. R. Co. v. McLallen*, 84 Ill. 109; *Darrigan v. N. Y. & N. E. R. R. Co.*, 52 Conn. 306; *Sheehan v. N. Y. C. & H. R. R. R. Co.*, 91 N. Y. 332; *L. C. & L. R. R. Co. v. Cavens*, 9 Bush, 560; *P., C. & C. R. R. Co. v. Henderson*, 37 O. St. 549.

A railroad company is bound to adopt such rules and regulations for the running of its trains as will insure safety, and having adopted them to conform to them or be responsible for consequences resulting from a departure from them. *C. & N. W. R. R. Co. v. Taylor*, 69 Ill. 461; *C., B. & Q. R. R. Co. v. George*, 19 Ill. 510.

The question of negligence is one of fact, which must be left to the jury for determination: *I. C. R. R. Co. v. Cragin*, 71 Ill. 177; *Northern Line Packet Co. v. Binniger*, 70 Ill. 571; *G. & C. U. R. R. Co. v. Dill*, 22 Ill. 264; *Burkett v. Bond*, 12 Ill. 87; *T., P. & W. R. R. Co. v. Foster*, 43 Ill. 415; *C. & A. R. R. Co. v. Pennell*, 94 Ill. 448.

The plaintiff, a common laborer, is not a fellow-servant with the train dispatcher. *C., B. & Q. R. R. Co. v. McLallen*, 84 Ill. 109; *Darrigan v. N. Y. & N. E. R. R. Co.*, 52 Conn. 306; *Sheehan v. N. Y. C. & H. R. R. R. Co.*, 91 N. Y. 332; *Louisville, etc., R. R. Co. v. Cavens*, 9 Bush. 560.

The conductor was not a fellow-servant with plaintiff, and

that for his negligence in this case the plaintiff would be entitled to recover. In order to constitute servants of the same master "fellow-servants," within the rule *respondeat superior*, it is not enough that they were engaged in doing parts of some work, or in the promotion of some enterprise carried on by the master not requiring co-operation, nor bringing the servants together or into such personal relations that they could have exercised an influence one upon the other promotive of proper caution in respect to their mutual safety; but it is essential either that they were actually co-operating at the time of the injury in the particular business in hand, or that their usual duties should bring them into habitual consociation so that such proper caution would be likely to result. C. & N. W. R. R. Co. v. Moranda, 93 Ill. 302; C. & N. W. R. R. Co. v. Moranda, 108 Ill. 576.

Who are fellow-servants, is a question of fact for the jury. C., B. & Q. R. R. Co. v. Bell, 112 Ill. 360; C. & N. W. R. R. Co. v. Moranda, 108 Ill. 576; I. & St. L. R. R. Co. v. Morgenstern, 106 Ill. 216.

We are aware it has been held by the Supreme Court of the State that the engineer, brakemen and shovelers employed on a construction train are all co-servants, engaged in the same branch of service. St. L. & S. E. R. R. Co. v. Britz, 72 Ill. 256; I. C. R. R. Co. v. Keen, 72 Ill. 512; C. & A. R. R. Co. v. Keefe, 47 Ill. 108.

But it has never been held by our court, so far as we have been able to discover, that a conductor of a construction train, with power to direct and control its movements, is a fellow-servant with a common laborer on such train.

It has been held, however, in other courts, that the conductor of a construction train is not a fellow-servant with a gang of laborers. St. P. & C. R. R. Co. v. Lundstorm, 16 Neb. 254; Moon v. Richmond & A. R. R. Co., 20 Iowa, 562; Little Miami R. R. Co. v. Stevens, 20 Ohio, 415.

And it has been held by the highest court in the land that a conductor, who has charge of a train and commands its movements, is not a fellow-servant with the engineer so as to produce a recovery by the latter against the company for an

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injury resulting from the conductor's negligence. *C., M. & C. R. R. Co. v. Ross*, 112 U. S. 377, and cases cited.

It is immaterial whether the conductor or foreman of the train were fellow-servants of plaintiff or not; if the accident was the result of the mutual and concurrent negligence of the company represented by its train dispatcher and the conductor or foreman of the train, the company would still be liable. *Grand Trunk R. R. Co. v. Cummings*, 106 U. S. 700; *P., C. & C. R. R. Co. v. Henderson*, 37 Ohio St. 549; *Elmer v. Locke*, 135 Mass. 575; *Busch v. Buffalo Creek R. R. Co.*, 29 Hun, 112; *Boyce v. Fitzpatrick*, 80 Ind. 526.

WILKIN, P. J. There are two theories upon which appellee's cause of action is based, and they are set forth in the first and second counts of his declaration. There is no evidence tending to support the third. There is no controversy of fact on the first count as to the allegation of negligence. Appellant concedes that whatever injury resulted to appellee by reason of the alleged accident was occasioned by the negligence of the engineer and conductor, or one of them; but maintains that they were fellow-servants with him at the time of the injury, and that therefore, in the absence of allegation or proof that it had failed to use due care in their selection, it is not liable. Appellee admits that by the law of this State this position is well taken, if the relation of fellow-servants existed, but he insists that as to the conductor, Culbertson, the evidence does not establish that relation. That the train in question was a construction train, and nothing more, is admitted; that the conductor, engineer, brakeman, fireman and workmen, including the appellee, all belonged to it and worked together is also conceded. It is admitted by counsel for appellee, that under this state of facts, by repeated decisions of the Supreme Court, the engineer, brakeman, fireman and workmen are held to be fellow-servants, engaged in the same branch of service, and hence the common master is not liable for any injury to one of them through the negligence of another; but they earnestly argue that the conductor sustains a different relation to the other employes connected with his

train, and as to his negligent acts, the same rule should not apply. This position is not based on the theory that he and the shovelers are not *consociated* with each other, within the requirement of the rule announced in the *Moranda* and other cases decided by the Supreme Court. In fact, it is difficult to conceive how it could be maintained that he sustains a different relation to them, in that regard, from that of the engineer or brakeman. The ground upon which the distinction is sought to be maintained is, that the conductor, being the superior officer of a train, and having the sole management and control of its movements, stands in the position of a vice principal, or as the "personal representative of the corporation." Whatever reason or authority may be adduced in support of this position, when applied to conductors of trains running on schedule time and under general rules, we do not consider it an open question in this State. *T., W. & W. R. R. Co. v. Durkin*, 76 Ill. 395; *Clark v. C., B. & Q. R. R. Co.*, 92 Ill. 43; *Aben v. T. H. & I. R. R. Co.*, 111 Ill. 210. Nor is the reasoning in the case of *C., M. & C. R. R. Co. v. Ross*, 112 U. S. 337, and other cases, holding that certain superior employes of a corporation are to be held as vice principals, applicable to the facts in this case. It needs no argument to show that the position of a conductor in charge of a regular train is altogether different from that of one in charge of a mere construction train. The latter, as shown by the evidence in this case, acts under special orders at all times in the movement of his train, and is engaged in special service. On the first count the case is not distinguishable from that of the *T. H. & I. v. Aben*, *supra*, by fair construction and on that count the law must be held with appellant. The second count fails to specifically charge any act of negligence on the part of the train dispatcher, but alleges generally that the injury resulted through his neglect in permitting the two trains to come together, it being his duty to direct and control their movements. It is said in the argument that the evidence shows that he was guilty of negligence in failing to notify the conductor of the work train that No. 47 was late, and that omission caused or contributed to the injury of appellee. The right to recover

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under this count is based on that theory. The only evidence tending to support this view of the case is that of Conductor Culbertson, given substantially, if not literally, in the foregoing statement. Railroad companies should be, and are by the law, held to a high degree of care and diligence in the adoption and enforcement of all needful rules and regulations to avoid collisions of trains, and if it can be fairly said from the evidence here, that the two trains in question were thrown together through the failure of appellant to provide for the government of its employes and officers such rules, its legal liability follows. And although there was no express rule of the company making it the duty of train dispatchers to notify those in charge of wild, or work trains, that regular passenger trains were late, yet if under all the circumstances proved such notice was reasonably necessary to prevent the collision, the failure of the dispatcher, who had control of the movement of all trains, to give it, would be negligence, and appellant liable. There is no pretense on the part of appellant that such notice was given, and therefore, by determining whether or not it was necessary, and whether or not the injury was the result of the failure to give it, we shall be able to settle the question of liability under the second count. In the absence of such notice, what were the rights and duties of the conductor of the wild train, and what had the train dispatcher a right to presume he would do? There can be, and there is, no dispute as to the fact that, by his working orders for that day and the general rules of the company, under which he says he was working, and which he fully understood, it was his duty to keep out of the way of No. 47, not only for the number of hours she was late, but as he says until he *knew* she had passed. He testifies: "I had to guard in and guard out. A man running a working train has to fight in and fight out." It is true that an attempt is made in his re-direct examination to confine his construction and understanding of the rules as to the rights of wild trains, to regular trains on time, but his testimony, all considered, bears no such construction and would be absurd if it did. A rule which would permit all wild or irregular trains to occupy the track against

regular trains, whenever the latter were off their schedule time, would be worse than nonsensical. These rules can not be so construed, nor did Culbertson so understand them. It is therefore clear that obedience to what he understood to be his plain duty, in the absence of notice or orders from the train dispatcher, would have prevented Culbertson's moving his train on the main line, where the collision occurred, until No. 47 had passed; and up to the time the collision occurred the train dispatcher had no more reason to anticipate disobedience to the working order and rules of the company than he would have had for believing that a dispatch giving notice that 47 was late, would be disregarded if delivered to him. Again, did the failure to give notice of the fact that the passenger train was late, cause the accident? A direct answer to this question is found in the evidence of Culbertson.

He swears: "I would not have started out that evening if I had not seen or if one of my men had not seen No. 47 go by first; if we had not, then in the absence of any order I would have stayed there; failing to get an order would not have caused the accident *unless I thought* 47 had passed." It is true he states in another part of his testimony that if he had received the same telegram that Paine and Wright did, the collision would not have occurred; and that perhaps is true, not, however, because it was necessary in order to fix his duty in the premises, but because he would have believed the dispatch, rather than his engineer, or taken steps to verify the statement of the latter. There can be no doubt that whatever necessity there was for notice from the train dispatcher as to the delay of No. 47, arose from the false statement of the engineer, and that alone. The train dispatcher had no knowledge of such false statement being made. It certainly can not be said that it was his duty to assume that false information would be communicated to Culbertson; or that he would act upon it if given. He had a right to presume that he would do his duty. That duty requiring him to keep out of the way of 47, until he *knew* it had passed, and such knowledge being within the power of Culbertson, beyond peradventure, the dispatch or notice as the facts then appeared was wholly unnecessary. Whether the true reason for sending orders to Paine and Wright and not to Culbertson, is given

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by the train dispatcher, or whether there existed any reason whatever therefor, is wholly immaterial. The mere fact that they had orders based on the fact that 47 was late, could in no sense change or affect the question of negligence in not notifying Culbertson. The authorities cited by counsel for appellee in support of the proposition that if, through the negligence of train dispatchers or other officials having charge and control of the movement of railroad trains, they are brought into collision, thereby causing injury to employes or others, the company will be liable, certainly announce a correct rule of law; but under the facts of this case they are wholly inapplicable. In the case of *Schuhlan v. New York Central and Hudson River R. R. Co.*, 91 N. Y. 332, the reported facts show that train No. 337 was irregular, and west bound from Auburn. No. 50 was a regular train, going east from Cayuga. No. 337 was ordered to Cayuga, regardless of No. 50, but no notice was given to the latter. The two collided, injuring the fireman of No. 337. It was held that there was negligence in not giving notice to No. 50. It need scarcely be said that the facts in that case and this are wholly unlike. There the officers in charge of the irregular train were acting in strict obedience to orders; here the conductor of the wild train in direct disobedience to his orders, and the general rules. The other cases cited are equally inapplicable. The evidence in this record fairly considered, must, we think, force any impartial mind to the conclusion that the facts in appellee's case are truly stated in the first count of his declaration, and not in the second. That his injury resulted from the negligence of the conductor, superinduced by the inexcusable carelessness or wilfulness of the engineer of the work train, and not by reason of any omission of duty on the part of the train dispatcher.

Reversed and remanded.

PILLSBURY, J., dissenting. I can not concur in this opinion. The evidence shows to my mind that the negligence of the train dispatcher, at least, concurred with that of the conductor in producing the injury, and in such case, even if the conductor is to be held a fellow-servant with the plaintiff, the action I think can still be maintained.

CASES
IN THE
APPELLATE COURTS OF ILLINOIS.

SECOND DISTRICT—MAY TERM, 1885.

FRANK S. BRESSLER
V.
THOMAS S. BEACH AND GEORGE G. KEEFER.

Action of Trespass against Sheriff and Deputy Sheriff—Right of Assignee of Plaintiff in Execution to Control Process—Notice—Fraudulent Sale—Possession—Instructions—Practice.

1. The assignee of the plaintiff in an execution has an undoubted right to control such process. But an officer engaged in the service of process is not bound to regard the directions of one whose interest therein is in no way indicated by or upon such process, or otherwise brought to his attention.

2. In an action against a Sheriff and Deputy Sheriff for taking certain horses, it is *held*: That the evidence justifies the conclusion that the supposed sale of the horses by the defendant in certain executions to his son, the appellant, was fraudulent and void as against creditors; that there had been no delivery of the horses to appellant; that it does not appear that the officer had notice of the assignment of the judgments to the appellant and of his ownership of the executions prior to the levy and sale, and that the instructions when considered together were substantially correct.

3. Where the court has sustained an objection to the admission of documentary evidence, the error, if any, is cured by the subsequent admission of such evidence when offered by the adverse party.

[Opinion filed June 8, 1886.]

APPEAL from the Circuit Court of Whiteside County.

Bressler v. Beach.

Messrs. C. J. JOHNSON and O. F. WOODRUFF, for appellant.

Mr. J. E. MCPHERAN, for appellees.

BAKER, J. This was trespass by appellant against appellees, Sheriff and Deputy Sheriff of Whiteside County, for taking four horses. The general issue was filed, and with it notice in writing of special matter in justification, to the effect the horses were the property of Peter Bressler and in his possession, and were taken by virtue of two executions issued out of the office of the Clerk of the Circuit Court of Whiteside County, upon judgments in favor of Frances Bressler and against Peter Bressler and August Schwertferger. The result of a jury trial was a verdict and judgment for appellees.

We think the evidence not only abundantly justifies the conclusion that the supposed sale of the horses by Peter Bressler to his son, the appellant, was fraudulent and void as against creditors, but also the further conclusion there had been no delivery of them to appellant, and that they were at the time they were levied upon in the possession and under the control of Peter Bressler, the defendant in the executions. There was, however, some conflict in the testimony upon this latter question; and if appellant was in possession, then such possession was sufficient to sustain the action against appellees, even though Peter Bressler was the real owner of the property seized, unless they had lawful authority to take the goods and chattels of Peter Bressler. *Tort feasons* can not justify a trespass by showing property in a third person. The right of appellees to levy upon the property of Peter Bressler was established, at least *prima facie*, by the two executions and judgments against him and Schwertferger which were in evidence before the jury; and it was wholly unimportant that the court had sustained an objection when they were offered as testimony by appellees, as they were afterward admitted in evidence at the instance of appellant, and it was the province and duty of the jury to pass upon the evidence as a whole.

It is objected, however, that the two judgments had been assigned on the record to appellant; that he thereby became

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the real owner of and plaintiff in them and the executions issued thereon, and had a right to control such executions; and that he directed the Deputy Sheriff not to make the levies, which direction was disregarded and the property seized and sold. The plaintiff in an execution, or his or her assignee, has an undoubted right to control such process; and in this case the assignments of the judgments were shown. The only litigated questions upon this point were, whether instructions had been given as claimed, and whether the officer had notice of the assignments, and that appellant was the owner of the execution prior to the levy or the sale of the horses.

The only evidence tending to show either notice of the assignment to or ownership by appellant of the judgments, or that either the levy or sale was forbidden by him, was his written notice to the Deputy of December 18, 1884, the day after the levy was indorsed, and his statement as to what was said between him and the Deputy at the time of such indorsement. His statement in regard to the conversation with the Deputy was, that he told Keefer the horses were his and he did not want him to take them—did not want him to have anything to do with them; that they were talking about the execution, and Keefer said he had the execution against his father and Schwertferger, and Schwertferger had given a bond indemnifying him in seizing the horses, and that he came out to make a levy, and was going to levy on some horses. That thereupon he said to Keefer, "I don't want you to levy on my horses, they belong to me;" and Keefer replied that he couldn't help it. That he then told Keefer he would rather he would return the execution than to make the levy, and that if there was any tender necessary in order to make the execution returnable, he would make a tender; and that Keefer answered that no tender was necessary, but that he was going to make the levy anyway. The language of the written notice was: "You are hereby notified that the five horses (describing them) which you have levied upon with an execution in favor of Frances Bressler, and against Peter Bressler and August Schwertferger, belong to me, and I hereby forbid you from taking or in any way meddling with said property."

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If anything in the conversation even hinted at the fact of appellant's ownership of the judgments, it was couched in language so ambiguous and uncertain that it can hardly be held to have been reasonably sufficient to put the Deputy upon inquiry. And the written notice, given before the horses were taken from the premises, seems by its very terms to exclude the idea that appellant had any proprietary interest in the judgments and executions, and the demand made in it was predicated solely upon a claim of ownership of the horses. It may also be stated, that there was nothing appearing upon the executions, by way of indorsement or otherwise, showing or intimating that he had any interest in them.

In the instructions given by the court the jury was told that if the officer knew, or was informed by appellant, or had reasonable grounds to suppose appellant was the owner of the judgments and executions, and if appellant gave instructions not to levy on the property, which were disregarded, then appellees could not justify under the executions, and that in such case it was immaterial, so far as the appellant's right of recovery was concerned, whether the sale of the property by Peter Bressler to him was fraudulent as to creditors or not.

It is evident from the instructions and the verdict that the jury must have passed upon the question of notice to appellees of the ownership of appellant of the judgments and executions, and must have found from the evidence that the officer making the levy and sale neither knew nor was informed of the assignment of the judgments, or had reasonable grounds to suppose that appellant was the owner of them. We are not prepared to say such finding was improper. From all that appeared upon the executions appellant was a stranger to them ; and he should have notified the officer of his interest therein, or at least have made such statements and claim as would be reasonably calculated to put the officer upon inquiry. A Sheriff engaged in the service of process is not bound to regard the directions of one whose interest in it is in no way indicated by or upon such process, or otherwise brought to his attention. The instructions of the court in this case were not altogether harmonious or accurate, but when considered

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together were substantially correct. The defects in those given for appellees were fully cured by other instructions given at the instance of appellant. As a whole, they were more favorable to appellant than the circumstances of the case justified. We think that substantial justice has been done by the verdict of the jury and judgment of the court.

The judgment is affirmed.

Affirmed..

GUY TURNER AND HARRY A. TURNER, BY THEIR
NEXT FRIEND,

V.

ARTHUR L. TURNER AND BENJAMIN F. TURNER.

*Administration—Bill to Recover Amount of Claim Allowed through
Fraud and Collusion—Advancement—Statute of Limitations.*

Upon a bill filed to recover the amount of a claim allowed in the County Court against an estate, it is *held*: That the claim presented by the father of the deceased was for money advanced to his son as a gift; that it was barred by the Statute of Limitations, and that it was allowed through fraud and collusion between the claimant and the administrator.

[Opinion filed June 14, 1886.]

IN ERROR to the Circuit Court of Livingston County.

Immediately following this case appears a report of the opinion of this court herein on a petition for a rehearing.

Messrs. A. E. HARDING and O. CHUBBUCK, for plaintiffs in error.

Messrs. JOHN H. JACKSON and J. T. TERRY, for defendants in error.

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Per Curiam. The appellants filed their bill in equity against defendants in error to recover the amount of a claim allowed in the County Court against the estate of William E. Turner, the father of plaintiffs in error, in favor of the father of said deceased and the grandfather of plaintiffs in error, Benj. F. Turner, of \$1,080. Another son of Benj. F. Turner and brother of Wm. E., Arthur L. Turner, was the administrator of the estate and is one of the defendants in error. The estate had been settled up and the administrator discharged. The charge is that by fraud and collusion between the claimant and the administrator this claim was allowed and paid.

The bill was, on final hearing by the court below, dismissed. The only question in the case is whether the evidence sufficiently shows fraud and collusion between the administrator and the claimant. There is no positive proof of such collusion and if it existed it must be established by the circumstances and the surroundings, but if established by such circumstances it is sufficient.

It appears from the evidence that Wm. E. Turner died some time in December, 1881, leaving his wife Nellie J., now by marriage, Raub, and his two infant children, who are the complainants and plaintiffs in error. The defendant in error, Arthur L. Turner, was by his own request appointed administrator of the estate consisting of personalty amounting to over \$3,000. The administrator was appointed about December 27, 1881.

On the 4th of March, 1882, the said Benj. F. Turner filed an account against the estate in the County Court for the amount of \$50, claimed to have been loaned to Wm. E. Turner, deceased, in his lifetime, on August 26, 1879, which claim with the interest, \$8.25, was duly allowed by the court and was afterward paid by the administrator. About one year before his discharge, which took place in January, 1884, the administrator had one or more conversations with Mrs. Raub, the mother of the plaintiffs in error, in which he told her that all the claims had been allowed against the estate that he knew anything about, and that there would be about \$1,000, after paying the debts and costs, to distribute. After this he had

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a conversation with her in regard to the appointment of a guardian for the children, desiring to be appointed himself. But Mrs. Raub refused and wanted her father, A. B. Moore, appointed, when he replied in substance that his father was much opposed to that, and said he would disinherit the children if it was done. Shortly after this conversation Benj. F. Turner, October 26, 1883, made out another account against the estate for money paid to the use of deceased, and swore to it before John H. Jackson, a notary public. It is shown by the testimony of the County Judge, Wallace, before whom the claim was allowed, that the administrator presented the claim for allowance himself, when the Judge told him there must be an affidavit which the administrator filed December 4, 1883, with the claim, and the claim was allowed June 3, 1884. No testimony was required by the administrator, but he vouched for the correctness of the claim himself, which was then allowed without proof. It further appears from the evidence that this money was advanced by the father to his son, Wm. E., deceased, some time prior to 1877, and as we think the evidence shows was a gift, as was also another \$1,000 to another son about the same time, no note ever being taken for the amount. To say the least, the Statute of Limitations had run against the claim and the proof fails to show that it had ever been revived.

The evidence tending to show a gift to the deceased son, coupled with the peculiar manner in which this claim was presented, so long after the first claim of the father was filed, and the administrator being the active agent in having it allowed without requiring proof, and his previous statement, we regard as strong evidence of collusion, and in connection with the other circumstances, sufficient to establish the fact that the claim was not a valid one; that the money advanced to the deceased was a gift, and never intended by the father to be claimed against the son or his estate.

The evidence also shows that the Statute of Limitations had run against the claim. The evidence also, we think, establishes the fact that the administrator well knew it, and that he procured his father to present the claim for allowance in which

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he was the active agent in procuring its allowance with the fraudulent intent of absorbing the balance of the estate and depriving the complainants of it. If the least defense had been interposed to the allowance of the claim it never could have been allowed, which the administrator must have known.

We are fully satisfied that the infant complainants have been defrauded out of this large sum of money by this "trumped-up" claim which the administrator actively assisted in getting allowed. This is sufficient to give a court of equity jurisdiction, and the bill should not have been dismissed, but the finding and decree should have been in favor of the complainants, for the amount out of which they were defrauded by the allowance of this unjust claim. The decree of the court below is therefore reversed, and the cause remanded to the court below.

Decree reversed and cause remanded.

GUY F. TURNER AND HARRY A. TURNER, BY THEIR
NEXT FRIEND,

V.

ARTHUR L. TURNER AND BENJAMIN F. TURNER.

Chancery Practice—Record—Evidence—Administration—Rehearing.

1. Upon a petition for rehearing this court adheres to its former conclusions.

2. A decree in chancery dismissing a bill will be reversed if, by the proofs appearing in the record, it is not justified, although it is not certified that the transcript contains all of the evidence.

The case of *Morgan v. Corless*, 81 Ill. 75, distinguished.

[Opinion filed December 18, 1886.]

IN ERROR to the Circuit Court of Livingston County; the
Hon. _____, Judge, presiding.

For a statement of the case and the conclusions of this court on the merits, see the preceding report of the opinion heretofore filed herein.

Turner v. Turner.

Messrs. A. E. HARDING and O. CHUBBUCK, for plaintiffs in error.

Messrs. JOHN H. JACKSON and J. B. Rice, for defendants in error.

Per Curiam. A petition for a rehearing has been filed in this cause. Upon re-examination we adhere to our conclusions, as stated in the opinion heretofore filed herein.

In the petition for a rehearing, it is suggested for the first time that there is no certificate of the evidence in the record; that the paper copied into the transcript and having the name of the Circuit Judge signed thereto, does not purport to be a certificate, and does not state that it contains all the evidence submitted upon the hearing.

It is claimed that if the plaintiff in error desired to question the sufficiency of the evidence to sustain the decree, it was their duty to have preserved the whole evidence in the record; and that the record must so show; and *Morgan v. Corless*, 81 Ill. 75, is cited as authority for such claim. That authority is not in point in the case before us. The rule there announced is applicable to chancery causes, where the decree is justified by the pleadings and the facts recited in the decree to have been found by the court, on hearing. But, in this case, the facts found by the court are not recited in the decree, and the only finding therein is, "that the evidence is not sufficient to sustain the allegations of complainants' bill," and, for that reason, the bill was dismissed at the cost of the complainants. The rule applicable to this case is that laid down in *Smith v. Smith*, 85 Ill. 189, where there was no certificate that the record contained all the evidence, and it was urged in support of the decree it should be presumed there was other sufficient evidence to warrant it. The court there said: "Such is not the rule in chancery practices. A decree in chancery dismissing a bill will be reversed if, by the proofs appearing in the record, it is not justified." In *Morgan v. Corless*, the facts to support the decree appeared in the decree itself; in *Smith v. Smith et al.* they did not.

The petition for a rehearing is refused.

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IRVING FRENCH
V.
ELDON H. BAKER ET AL.

Bill to Enjoin Enforcement of Judgment in Attachment—Presumption in Favor of Its Validity—Ex parte Evidence, Presumed Sufficient under Common Counts—Collateral Attack—Fraud—Return of Worthless Note.

Upon a bill to enjoin the enforcement of a judgment rendered by default in attachment proceedings, it is *held*: That if the special count in the declaration filed in such proceedings was bad, it will be presumed that the evidence heard *ex parte* therein justified the judgment under the common counts; that such judgment can not be attacked collaterally, even if errors and irregularities in the course of the trial were conceded; that it can not be presumed that the judgment was obtained by fraud, and that it was unnecessary in the attachment proceedings for the plaintiffs to return a worthless note, the names of the securities to which were forged, which they had previously accepted in settlement of the indebtedness.

[Opinion filed December 11, 1886.]

APPEAL from the Circuit Court of Winnebago County.

Statement of the case by WELCH, J. This was a bill filed by the appellant to enjoin the enforcement of a judgment rendered in favor of Eldon H. Baker and Edward A. Baker against Michael Fox, in attachment proceedings against said Fox, and to perpetually enjoin the appellees from selling certain lands and premises in said bill described. The bill alleges the recovery of three judgments in favor of the appellant against said Fox, on the 1st day of October, 1883; that the judgments are in full force; that Fox was insolvent and had fled the country, and that the only property out of which satisfaction for his judgment could be had was the land levied on under the attachment proceeding of said Baker against Fox, on which the judgment sought to be enjoined was rendered. Alleges that the judgment in favor of the Bakers was without consideration and void. Temporary injunction was granted on bill. The answers admit the judgments in favor of appel-

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lant, the insolvency of Fox and his flight from the country, but denies that the judgment in favor of Bakers was without consideration or void. Replication filed; cause heard on this stipulation:

It is hereby stipulated and agreed by and between the above named complainants and defendants that this cause shall be heard upon the bill, answer and replications filed herein, and upon the following agreed statement of facts:

That the defendants Baker, on the third day of September, 1883, commenced in this court their certain action of attachment, returnable to this October, 1883, term thereof, against said Michael Fox; that a copy of the affidavit upon which the same was based is marked "Exhibit A," and is attached to the bill filed herein; that on the 10th day of September, 1883, the plaintiffs and defendant in said attachment suit agreed upon a settlement of the subject-matter of the same, by the delivery, by the defendant Fox, to the plaintiffs, of certain articles of personal property, and the execution and delivery by the said Fox to said Bakers of a certain promissory note as hereinafter stated, of which the following is a true copy:

\$530.

ROCKFORD, Ill., September 10, 1883.

Six months after date I promise to pay to the order of E. H. Baker and E. A. Baker five hundred and thirty dollars, with interest on said sum at seven per cent. per annum, payable at Durand, value received.

(Signed)

MICHAEL FOX,
THOMAS FOX,
ANN FENLON.

That the said articles of personal property and the said notes are now held and possessed by the said Bakers; that the said Thomas Fox and Ann Fenlon will both testify that the said note is a forgery; that the first day of said October term, 1883, of said court, occurred on the first day of October, 1883; that on the first day of October, 1883, the complainant recovered three cognovit judgments against the said Michael Fox for the aggregate amount of \$2,853.28, and costs of suits, and that executions on the same day were duly issued and delivered to the Sheriff of said county to execute and that said judgments

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at the time of the filing of the bill herein were wholly unsatisfied. That on the 9th day of October, 1883, a declaration was filed in said attachment cause, a true copy of which is attached to said bill marked "Exhibit B"; that on the 15th day of October, 1883, evidence was heard *ex parte*, and judgment was rendered in said attachment proceeding by default of said Fox for the sum of \$570, and that special execution was awarded to sell the lands and premises upon which the said attachment levy was made, and that the same were advertised for sale as set forth in said bill; that in August, 1883, the defendants, Bakers, were the owners of certain real estate, and then and there agreed to trade such real estate to said Michael Fox, subject to the incumbrances, for the equity of redemption in lands in the village of Durand, and the Bakers to assume a mortgage thereon of \$1,000 and interest, and gave Bakers a warranty deed subject to said \$1,000 mortgage, and fraudulently represented to them that that was the only incumbrance. Soon after the deeds were exchanged the Bakers learned that the land in Durand was also incumbered by a \$500 mortgage held by and given to L. French, and not due until December, 1883, and this was a breach of the warranty deed given in trade by M. Fox, as alleged in the answer; and said Fox knew it at the time it was given; and that before the attachment suit was begun, the Bakers saw Fox and settled, and that said Bakers will testify that it was mutually agreed to settle the same, and Fox then agreed with them and promised Bakers that he would that day fix the matter up and pay them; that he failed so to do and the attachment writ was then sued out, and after that the attachment suit was settled on condition that said Fox would give them said note for \$530, signed by Ann Fenlon and Thomas Fox as surety; that he did bring what purported to be such a note, which said Ann Fenlon and Thomas Fox will testify is a forgery; that on the trial of said attachment suit evidence was heard in open court, and that immediately after giving said note said Fox absconded and has not since been heard of; that he not only obtained said land in such trade but also sold certain personalty that was also mortgaged, and that in the settlement all such chattel

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mortgaged property was settled for, and the note was given for amount due on said \$500 incumbrance. That at the time of the commencement of said attachment proceedings and the recovery of the said judgment by the said Bakers, no part of the said mortgage indebtedness of \$500 dated on or about April 23, 1883, due December 27, 1883, and interest at seven per cent., and given by said Fox to said French, and described in said declaration, was not paid in whole or in part by said Bakers or by any other person at the time of the rendition of said attachment judgment, nor until the 31st day of December, 1883; that the same became due on the 27th day of December, 1883, and that the same was paid on the 31st day of December, 1883, by said Bakers, and discharged of record on that day.

EXHIBIT B.

E. A. Baker and E. H. Baker, partners, etc., plaintiffs, by J. C. Garver, their attorney, complain of Michael Fox, defendant, of a plea of trespass on the case upon promises. For that whereas, heretofore, to wit: on the 27th day of August, 1883, in said county, the defendant, by his deed bearing date of that day, and now to the court here shown for the consideration therein mentioned, did grant, bargain and sell to the plaintiff, his heirs and assigns, a certain parcel of land in the said deed particularly described, situated in the village of Durand, in the county of Winnebago and State of Illinois, to have and to hold the same to the plaintiff, his heirs and assigns, forever; and the defendant did by the said deed covenant with the said plaintiff, his heirs and assigns, amongst other things, that at the time of the ensealing and delivery of the said deed, the said parcel of land was free and clear from all former or other grants, bargains, sales, liens, taxes, assessments and incumbrances of what kind or nature soever. Yet the plaintiff avers the said parcel of land was not, at the time of the ensealing and delivery of said deed, free and clear from all former or other grants, bargains, sales, liens, taxes, assessments and incumbrances, of what kind or nature soever, but on the contrary thereof, the defendant, before that time, to wit: on or about June, 1883, by his deed on that date, had

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mortgaged the said parcel of land to one Irvin French, to secure the payment of \$500, with interest thereon at the rate of seven per cent., to the said Irvin French, in one year from the date thereof; which said sum of money, with interest as aforesaid, is still unpaid, and the said parcel of land is still chargeable with the payment thereof. And plaintiffs aver that they took said land subject to one incumbrance mentioned in said deed, but defendant then had the land incumbered for another sum, and falsely represented, with intent to cheat and defraud plaintiffs, that the one incumbrance of \$1,000 was the sole lien against said premises brought, whereas then and there was said sum of \$500 and interest at seven per cent. and the taxes of 1883, all of which plaintiffs must pay to get a clear title to the same, at, to wit: the county aforesaid, which defendant afterward, and before the commencement of this suit, promised to pay to plaintiffs.

Then follow the ordinary common counts, and concludes with the usual breach.

The injunction was dissolved and bill dismissed, from which order dissolving the injunction and dismissing the bill this appeal is taken.

Mr. G. O. WILLIAMS, for appellant.

Mr. J. C. GARVER, for appellee.

WELCH, J. The judgment sought to be enjoined was recovered by the appellees, Bakers, against Fox, on personal service and default. The declaration contained a special count and the common counts. It is insisted by counsel for appellant that the special count stated no course of action on which a recovery could be maintained and that therefore the judgment is void. If it be conceded that the special count did not show that there was a *bona fide* indebtedness existing between Fox and Bakers at the time of the commencement of the attachment proceedings, yet, as held in the case of *Hopkins Rowell v. George Chandler*, 83 Ill. 288, when the declaration contains the common counts and judgment is rendered by default, it

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will be presumed, in the absence of a bill of exceptions to the contrary, that the court heard evidence to justify the judgment under the common counts. The stipulation in this case states that on the 15th day of October, 1883, evidence was heard *ex parte* and judgment was rendered in said attachment proceeding by default of said Fox for the sum of \$570.

In this case there is no necessity of a presumption that evidence was heard. It is expressly stipulated that evidence was heard. The court had jurisdiction of the person and subject-matter, and the judgment can not be attacked collaterally, even though it was conceded that there were errors and irregularities committed during the progress of the proceeding. *Buckmaster v. Carlin*, 3 Scam. 104; *Mulvey v. Gibbins*, 87 Ill. 367; *Martin v. Judd*, 60 Ill. 79; *Town of Lyons v. Cooledge*, 89 Ill. 534; *Frydendale v. Baldwin*, 103 Ill. 325. It is further insisted by counsel for appellant that Bakers having accepted the note of Fox set out in the stipulation, *supra*, on settlement, that no recovery could be had on the enjoined indebtedness without the return or offer to return the note. And we are referred to the case of *Brooks v. Gates*, 8 Ill. App. 435, as sustaining that view. That case is not analogous to the one at bar. In that case the party was seeking to recover what he had paid on a contract, without returning or offering to return what he had received on it. The principle announced in that case is elementary. In the case at bar, nothing was received on the note. It was taken for a present indebtedness. The names of securities thereto are admitted to be forged, the principal was insolvent and had fled the country. The note was worthless. The delivery of the forged note to Bakers did not change the character of the liability to them, nor did it affect them or require of them the return of the worthless paper to entitle them to prosecute this suit against Fox. In the view we take of the law, every presumption must be indulged in favor of the validity of the judgment. That it was obtained by fraud can not be presumed. Fraud must be alleged and proved. Applying to this case the rule announced *supra*, we find no error in the decree dissolving the injunction and in dismissing the bill.

Decree affirmed.

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MICHAEL MARTIN

V.

THE TOWN OF LA SALLE.

Commissioners of Highways—Compensation for Services—Act of 1879—Employment, not Limited to Attendance at Board Meetings—Evidence.

In an action by a Commissioner of Highways to recover for services growing out of his official duties, it is *held*: That under Sec. 117 of the Act of 1879, a Commissioner of Highways is entitled to recover \$1.50 per day for each day necessarily employed in the discharge of his official duties; that such employment is not limited to attendance upon official meetings of the Board, and that a general offer to prove that the plaintiff rendered services upon the highways, covering an extraordinary number of days, was too general, and did not tend to prove any item for which he was entitled to recover.

[Opinion filed December 11, 1886.]

APPEAL from the Circuit Court of La Salle County; the Hon. CHARLES BLANCHARD, Judge, presiding.

Statement of the case by LACEY, J. The appellant was elected one of the Road Commissioners of the Town of La Salle, on the 7th of April, 1880, and held the office till April, 1883, when his successor was elected. During the first year James Kinder and Edward McGuire were his associates; the second year Charles Degan and James Kinder, and the third year Charles Degan and Richard O'Halleran.

This action was commenced in the Circuit Court in action of assumpsit. The action was for some kind of services growing out of his official duties as Commissioner of Highways of the said town during his term of office. Verdict and judgment for the appellant in the sum of \$46.50; considering the amount not enough he has prosecuted this appeal to this court.

Messrs. MALONEY & STEAD, for appellant.

Messrs. BULL, STRAWN & RUGER, for appellee.

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LACEY, J. If we can fairly understand from the record in this case the nature of appellant's claim, the most of the evidence having been excluded by the court, it is as stated by his counsel, compensation for attending to discharging the duty of superintending and taking charge of the roads and bridges in the town. The claim offered to be proven was for 273 days from April, 1880, to April, 1881, at \$1.50 per day for services rendered on the highways of the said Township of La Salle in pursuance to appointment by the Board of Commissioners, and by virtue of his being Commissioner of Highways, and some 400 days labor performed on like account, to the end of his office. It is disclaimed that the compensation for this service can be collected out of the fund raised by taxation in Secs. 16 and 119, of the Act of 1879, nor is it indebtedness arising out of a contract with two Commissioners as such, for work and labor on the roads and bridges. It is an indebtedness created by law as a necessary incident to the discharge of the duties of the Commissioners when such services are necessary and proper to be rendered in discharge of the duties imposed on them, and for which they are not compelled to contract with themselves or the Town Board, and must be paid for out of the town fund. It is claimed that such compensation comes out of the payment of the general town fund as provided for in Sec. 117 of the Act. It is admitted that the duties performed by appellant might be performed by the overseer, but it is claimed that makes no difference.

The questions arising in this case arise on the rejection of evidence offered by appellant to establish his case. After introducing several records of the Commissioners of Highways, by one of which records it appears that the appellant was "to attend to district No. 1, gravel road," and at meeting May 3d, "to have the bridge repaired," then this question was propounded to the appellant: "Now I desire to ask you whether, in pursuance to the appointment referred to in the record just read, to attend to district No. 1, gravel road, you did any work or labor on the highways of the Township of La Salle." The question was objected to and the court sustained the objection and ruled it out.

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The plaintiff by his counsel then made the following offer of proof: "We offer to prove by this witness that in pursuance to those appointments referred to in the record just read from exhibit "A," and by virtue of being Commissioner of Highways and for the time expended in making up the records, that he rendered services on the highways in said Township of La Salle from April, 1880, to April, 1881, 273 days." This, on like objection, was ruled out by the court. A like question in regard to over 400 days for the next two years was ruled out. Appellant's offer to show that the claims were properly presented to the town auditors for allowance and that they rejected them was likewise ruled out by the court. This brings up the question as for what kind of services the Commissioners of Highways under the Act of 1879 may properly be allowed. This is a question not easy to determine in all cases, or to adopt a general rule in advance that would be a sure guide under all circumstances that may arise under the varied requirements of the act, and we will not undertake to do so. It will be enough that we pass correctly on the case before us. It should be the object of the court to so hold in regard to what are the official duties of the Commissioners and manner of their performance as to give the law that force and efficacy contemplated by the statute, and at the same time prevent the Commissioners from overstepping the powers delegated to them by the statute. The office is a very important one, and the interest of the public is very much bound up in its proper and efficient exercise. The statute in regard to the compensation of the Commissioners of Highways is as follows—Sec. 117, Act of 1879: "The Commissioners of Highways shall receive for their services the sum of one dollar and fifty cents per day for each day necessarily employed in the performance of their duties, the same to be audited by the town auditors and paid out of the town funds." It follows as a matter of course that whatever it is proper for a Commissioner of Highways to do, or whatever he may do properly in the discharge of his official duties, he should be paid for, at the rate specified in the act for the number of days necessarily engaged.

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It is contended on the part of appellee that the Commissioners of Highways is a *quasi* corporation, and can only act in its corporate capacity, and that must be at a regularly called meeting of the board at which all are present, or of which all had notice and might have been present. The authority can not be delegated to a single member. The law requires they must act in a body, and that none of their acts are binding unless two of their members acquiesce therein. One member can not be delegated to take charge of a particular job or piece of work. They might employ an overseer but could not do it themselves. It is claimed that the only evidence of the time of performance of official duties is the record of the annual and special meetings of the board, under the requirements of the 12th section of the act, at which times "a correct record of the proceedings of the meeting" is to be kept. This proposition assumes that no other official duties of the Commissioners are required or allowed except the attendance on these meetings, and that the record shows the number of days occupied. The court below excluded all other offered evidence except the record, to show the days employed in the discharge of appellant's duties, and then instructed the jury that there was no other evidence before them than those records tending to show appellant's right of recovery, and that he was only entitled to recover for the time those records show the appellant was engaged in the discharge of his duty as Highway Commissioner.

We are inclined to think that the theory in this respect insisted on by appellee's attorney is erroneous; but whether the appellant, in his rejected offers of evidence, proposed to show facts that would entitle him to recover for anything more than he has recovered for, is a question we will consider hereafter. In *Commissioners v. Baumgarten*, 41 Ill. 254, two of the three Commissioners of Highways of the Town of Lancaster signed a contract with the City of Freeport to stand the town's share under the law to build a certain bridge. It was held a good execution of the contract, the court saying that such *quasi* corporation act by a vote of the majority, unless some provision is in the law to the contrary. If they were

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not a corporation, then the act being silent as to how many shall constitute a quorum, a majority may act.

So where a number of persons are intrusted with powers in matters of public concern, all of them being assembled and consenting, the majority may act and determine, and where a report is signed by only two viewers of a road, it will be presumed a third was present and consulting until the contrary is shown. In *Branns v. The Town of Peoria*, it was held that two Road Commissioners, without consultation of the third, could not employ themselves or do work not allowed by law, or where there was no money raised or assessed for that year to pay for it, it was not decided what effect the consent of the third Commissioner would have on the contract. This was said with reference to payment of the road and bridge taxes. In *Hizer v. Town of Rockford*, 86 Ill. 325, under the following circumstances, it was held that the overseer of highways was criminal in not obeying the order of the Commissioners. The facts were that in March the three Commissioners passed over a road and found it needed repairs. In June following two of the three being together visited another and different road and found the overseer at work with his men and teams, and ordered him to desist and to repair the first road mentioned, which he refused to do.

The court say : " It will be observed that the Commissioners of Highways are given, by the terms of the law, the care and superintendence of bridges and highways in their towns. * * * The Commissioners have a higher power over roads than the overseer as his duty is 'to repair and keep in order.' The former has the general power and direction, while the latter acts in a subordinate capacity."

Sec. 10 of the Act of 1879 is nearly the same as the above referred to and must have the same construction. It is plain to be seen that no record of the action of the Commissioners was preserved of the time the Commissioners were engaged in the official duty, nor was there any necessity for any formal meeting of the Board, yet they would be entitled to pay for the care and superintendence of the road. Some of the duties of the Commissioners appear to be of a nature that requires

management and decision, such as determining the propriety of building bridges, entering into contracts and laying out roads, and other things that require deliberation and consideration for the determination of such questions. Doubtless a formal meeting of the Board would be necessary, but there are duties, such as giving directions for the repairing of roads of one determined by the Board to take possession, and keep scrapers and other tools belonging to the town wherever the same may be found, etc.; preventing thistles, burdock, cockleburrs, Indian mallows and other noxious weeds from seeding in the public highway, and destroying cockleburrs and weeds growing in the highway before coming to maturity. Such acts would not seem to require much deliberation, and is a matter that the statute directs to be done. The failure of the Commissioners to comply with the law in regard to destroying cockleburrs, subjects them to a penalty of not less than \$5 and not more than \$25. Session Laws, 1879, page 264. Many duties are more in the nature of ministerial acts, and are required to be done by law. The consent of less than two would be sufficient, and even might be presumed to make the act legal. If one Commissioner should spend a day in gathering up road scrapers and other tools, and preserving them under the law, this act would no doubt be approved, although no express consent of the other two was obtained, and the Commissioner would be entitled to pay under the statute. But generally, the duties of the Commissioners are those of management and general direction, and it is no part of their general duties to do the manual labor on roads and bridges by virtue of their office of Commissioners of Highways. There is an express fund provided for, for that. Section 119 raises a fund for building and repairing bridges * * * and to pay the Overseer of Highways, and this tax is to be assessed annually. The Commissioners would not be authorized under this act to perform the duties of the commission and charge for it out of the town fund, where there is no special fund provided to pay the overseer, whose duty it is to do the work.

The remaining question is, did the offer of the proof by appellant, which was rejected by the court, necessarily tend to

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prove any item that the appellant had a legal right to recover for. The first question, did appellant do any work or labor on the highways of the township under the order to attend district No. 1 gravel road.

The order was that "M. Martin attend to gravel road in No. 1 district." This order did not authorize appellant to do work and labor on the highways of the town generally, or to perform work and labor at all. The next question was the offer to prove that appellant rendered services on the highways of said township of La Salle from April, 1880, to April, 1881, 273 days, and that by virtue of his office and under the authority of the appointment in the record in evidence. According to the record of the Board of Commissioners relied on, appellant was given the gravel road in district No. 1 to attend to, and the other record that appellant have the bridge repaired. The term "services on the highway in the township" was too general. The court could not see that the offer was proper. It should have been specific. There seemed to be an effort by the doubtful meaning of the question, to keep in the background what the real nature of these services were. Appellant did not even propose to prove that the services were performed in district No. 1, or on the bridge. Then the extraordinary number of days charged for what the law requires of a Commissioner, was enough to attract the attention of the court to the guarded way in which the proposition to produce proof was made. The court could not see the relevancy of such evidence. In regard to the services in making up the records it will be seen the proof already in, showed that the records were in evidence and the recovery no doubt covered that. If it had been different services, then the records themselves showed it should have been so stated, or if the records did not show sufficiently the number of days. Seeing no error in the record the judgment is affirmed.

Judgment affirmed.

Dickey v. Town of Bruce.

T. LYLE DICKEY
V.
THE TOWN OF BRUCE.

Practice—Bill of Exceptions—Time to File—Extension of—Want of Jurisdiction—Notice.

1. When a Judge by an order has fixed the time within which to prepare, tender and file a bill of exceptions, and the term at which it was fixed having expired and no motion for an extension of time having been made, either in vacation or at a subsequent term prior to the expiration of the time so fixed, he is without jurisdiction further to extend the time.

2. In the case presented, it is *held*: That a notice of an application for an extension of time within which to file a bill of exceptions, if given as claimed, was insufficient, no time and place for making the application having been fixed, and the notice not having been in writing.

[Opinion filed December 11, 1886.]

IN ERROR to the Circuit Court of La Salle County; the Hon. CHARLES BLANCHARD, Judge, presiding.

Mr. T. LYLE DICKEY, in person, for plaintiff in error.

The term at which the judgment in case No. 728 was rendered having ended, and the fifty days given in which to prepare and file the bill of exceptions having expired, the orders of February 12 and 17, 1885, being made *ex parte* on the application of defendant's counsel, and without the knowledge or consent of the plaintiff, were void, the court having no jurisdiction of the matter.

If the court could take jurisdiction at a subsequent term it erred in entering the orders extending the time for preparing and filing the bill of exceptions, without notice to the plaintiff or his attorneys of the time and place when the application for such extension would be made, and without the knowledge or consent of either. *Hall v. Mills*, 5 Ill. App. 495; *Saltonstall v. Canal Commissioners*, 13 Ill. 705; *People v. Blades*, 10 Ill. App. 17.

Messrs. MAYO & WIDMER, for defendant in error.

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If the opposite party had notice of the application, the Circuit Court had jurisdiction at the January term, 1885, to extend the time granted at the December term, 1884, to the defendant, in which to prepare, tender and file a bill of exceptions.

In *Wallahan v. People*, 40 Ill. 102, an amended record, purporting to be an additional bill of exceptions, signed in vacation more than a year and a half after the trial of the cause, and without notice to the opposite counsel, was filed by the appellee in the Supreme Court, at the April term, 1867, and, on motion of the appellants, was stricken from the files. The court suggested that when an amendment of that kind was desired, it should be made to appear from an order entered in open court in term time, on proper notice.

At the September term, 1867, in the same case—40 Ill. 102—an additional transcript was filed containing evidence not in the original bill of exceptions, the bill of exceptions therein certified being signed two years and four months after the trial of the cause. Appellants moved to strike the additional transcript from the files, but the court overruled the motion. See, also, *Bergen v. Riggs*, 40 Ill. 61; *Brooks v. Bruyn*, 40 Ill. 64; *Myers v. Phillips*, 68 Ill. 269.

WELCH, J. This cause was before this court at the May term, 1885, and was taken, but not having been decided, and judgment entered, when the plaintiff in error died, the order taking the case was set aside. The executrix having entered her appearance, the case was retaken at this term. The bill of exceptions here in controversy was a part of the record in the original cause appealed to the Supreme Court, and it would seem that court was the proper tribunal to determine whether said bill of exceptions was passed on in apt time, and properly became a part of the record. We would feel inclined to refuse to take jurisdiction of the matter were it not for the judgment of costs against plaintiff in error. As it is, we do not see how we can well avoid so doing.

On the 23d day of December, 1884, that being one of the days of the October term of the LaSalle Circuit Court, plaintiff

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iff in error, T. Lyle Dickey, recovered a judgment against the defendant in error for the sum of \$2,000 and costs. On that day the defendant in error prayed an appeal to the Supreme Court, which was allowed, and fifty days given in which to prepare, tender and file a bill of exceptions. On the 12th day of February, being one of the days of the January term of said court, and fifty-one days after the entry of the order giving fifty days in which to prepare, tender and file the bill of exceptions, the following order was made: "On this day comes the defendant, by Mayo & Widmer, its attorneys, and on its motion it is ordered by the court that the time heretofore allowed wherein to prepare, tender and file a bill of exceptions in this case, be and the same is hereby extended ten days." And on the 17th day of February, one of the days of the January term of said court, a similar motion for extension was made, and ten days given. On the 25th of February, one of the days of the said January term, T. Lyle Dickey came into court and entered a motion, and caused the same to be docketed as an independent case against the Town of Bruce, and moved the court to set aside the said orders of February 12 and 17, 1885, on the ground that there was no suit at the time said orders were made pending in said Circuit Court, in which he was plaintiff and the Town of Bruce defendant. To this motion the Town of Bruce, by its attorneys, entered its appearance. On March 3, 1885, one of the days of the said January term, the motion was heard and denied, and judgment rendered against the plaintiff, T. Lyle Dickey, for costs. To reverse this judgment this writ is prosecuted. All exceptions shall be taken and signed at the term they are taken, or the Judge may in an order give time in which it may be done. When the Judge by his order has fixed the time, and the term at which it was fixed having expired, and no motion having been made either in vacation or at a subsequent term prior to the expiration of the time fixed in the original order for extension of time, the Judge has no jurisdiction of the matter, the case having passed from his jurisdiction. It is, however, insisted by counsel for defendant in error that he informed Mr. Richolson, who it is claimed was the attorney

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for plaintiff in error, some two or three days prior to the application on the 12th of February, that an application would be made for an extension of time in which to file bill of exceptions; that no time was named when and where the application would be made; that the attorney to whom the notice was given was present in court when the application was made; that this gave to the court jurisdiction. As to whether notice was given as claimed, there was a direct conflict, Richolson and his partner denying the same, and Mayo, attorney for defendant in error, asserting the giving of the notice; Richolson also denied that he was the attorney of plaintiff in error. We are not, in the view we take of this case, called upon to determine the question as to which of these parties credence is to be given.

Conceding the notice was given as claimed, we hold it was insufficient. No notice in writing; no time when and where the application would be made is claimed. The order as made negatives any notice to or appearance of the plaintiff in error. "On this day comes the defendant by Mayo & Widmer, its attorneys, and on its motion, it is ordered by the court, that the time heretofore allowed whercin to prepare, tender and file bill of exceptions, in this case be, and the same is hereby extended ten days," and on the 17th a similar order is made. The motion of plaintiff in error should have been allowed. *Evans v. Fisher*, 5 Gil. 453; *Hall v. Mills*, 5 Ill. App. 495; *Warner v. Kelley*, 5 Ill. App. 559.

For the errors herein indicated, judgment is reversed and cause remanded.

Reversed and remanded.

Seymour v. Mackay.

JOHN W. SEYMOUR ET AL.

V.

DUNCAN MACKAY ET AL.

Trust Deed—Release of—Cross-Bill to Restore—Fraud—Acceptance of New Note as Ratification—Review of Evidence.

Upon a writ of error to review a decree dismissing a cross-bill, filed to determine the priority and extent of the liens claimed by the cross-complainant in certain lands, and to have the cancellation of a certain trust deed declared void and the trusts therein established, it is *held*: That the record does not present sufficient evidence to sustain the charge of fraud in procuring the release of said trust deed; and that the subsequent acceptance by the cross-complainant of a new note for the indebtedness covered by said trust deed, with full knowledge of said release, was a ratification thereof.

[Opinion filed December 11, 1886.]

IN ERROR to the Circuit Court of Carroll County; the Hon. JOHN V. EUSTACE, Judge, presiding.

Messrs. W. & W. D. BARGE, for plaintiffs in error.

Messrs. E. P. BARTON and J. M. HUNTER, for defendants in error.

WELCH, J. In the view we take of this case, we do not deem it necessary to consider the question presented by the original bill in the case, any further than may be necessary to the proper determination of the questions arising on the cross-bill. The complainant in the original bill does not appear by himself or counsel in this court, his name being used by Seymour, the complainant in the cross-bill, for the purpose of enabling him to prosecute this writ of error. His right to use the name is given by Sec. 71 of Practice Act. The original bill filed by Belding was on hearing dismissed by the Circuit Court, and also the cross-bill filed by Seymour was dismissed.

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The only party before the court complaining is the complainant in the cross-bill. The cross-bill charges that the plaintiff in error, John W. Seymour, loaned David Belding \$3,700 on the 13th day of December, 1867, for five years from the first day of January, 1868, at ten per cent. interest, for which Belding gave his promissory note, payable to Helen M. Seymour, the wife of John W. Seymour, and secured the same by trust deed to her, on the southwest quarter of section 30, in township 21, range 6, east of the 4th P. M., and the northwest quarter of section 31, in same township and range, in Carroll County, Illinois, which trust deed was recorded on the thirtieth of August, 1871. The cross-bill further charges that the money was the money of said John W. Seymour, and that the note and trust deed were made to his wife in order to place the matter in her hands in the event he should lose his life in the dangerous occupation in which he was engaged, of running trains on the railroad. That no portion of the money belonged to her and no part had been paid to her or him. That on the 10th day of October, 1871, Helen M. Seymour, at the request of her father, released said trust deed. That on the 5th day of February, 1870, Belding and wife executed to the defendant in error, Mackay, a conveyance in fee simple to said lands, together with other lands, for the consideration of the sum of \$4,000. It is charged that Mackay paid the same by assuming payment of a mortgage to Jennings and mortgage to Lyman, and giving to Belding the balance in cash; that Mackay executed to Belding at the same time an agreement to reconvey on his being paid his \$4,000, and interest at ten per cent. The cross-bill further alleges that about the first day of October, 1871, Belding, with the aid of Mackay, made an application to the Northwestern Life Insurance Company of Milwaukee, for the money sufficient to pay off all claims on the land, and that Mackay signed a certificate to the effect that the Belding farm was worth \$75 per acre. And that Helen M. Seymour was then and there informed that it would be necessary to cancel the record of said trust deed, which she held, and believing that said Mackay was acting in good faith in making his statements as aforesaid

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as to the condition and value of said land, and that he really intended to aid Belding, her father, in obtaining said money of said insurance company, and that he was going to settle up with said Belding, as he then talked of doing. At the special request of her father, said David Belding, she canceled her trust deed of record. The cross-bill further charges that after the trust deed was canceled Mackay persuaded Belding not to borrow of the insurance company, and thereby prevented her from obtaining payment of her trust deed. It also charges: Mackay in his attempt to aid Belding did so solely to get your orator's said trust deed to said Helen removed to pave the way for him to obtain said farm of said Belding without advancing any larger amount of money than what he had already loaned him. It further charges that he had never consented or assented to the release of said trust deed by said Helen. Bill prays that Belding and Mackay shall come to an accounting with each other and with Seymour so far as may be necessary to determine the priority and extent of Seymour's liens; asks that the Jennings mortgage be declared canceled; that the land in the Helen M. Seymour trust deed be declared subject to the trust therein declared; that the receipt and attempted cancellation of the same be declared void, and the trusts therein be established by decree, and for a decree for the sale of the land for the purpose of satisfying the amount due on the said note and trust deed. The answer of Mackay to those charges are, that until the filing of the Seymour cross-bill he never had any information of the existence of the Helen M. Seymour trust deed, or that either Seymour or his wife ever claimed any lien on any part of the land. Denies that he in any way hindered Belding from borrowing money of the life insurance company. Denies that he ever made any certificate that the land was worth \$75 per acre. He denies that the Jennings mortgage constituted any part of the consideration of the \$4,000 loaned by him to Belding. The court dismissed the cross-bill on hearing, and to reverse that decree Seymour has brought the case to this court by writ of error. Under chapter 67, title Mortgages, Sec. 8, it is provided that the mortgagee "shall, at

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the request of the mortgagor, enter satisfaction upon the margin of the record of such mortgage in the recorder's office, which shall forever thereafter discharge and release the same and shall bar all actions or suits brought thereupon." It is insisted by the counsel for plaintiff in error that the entry of satisfaction was procured by fraud. The bill alleges that Helen M. Seymour was then and there informed by said Belding and said Mackay that it would be necessary to cancel the record of said trust deed, and believing that said Mackay was acting in good faith in making his statements as aforesaid, as to the condition and value of said land, and that he really intended to aid said Belding in obtaining said money, she executed the release. The court found there was not sufficient evidence to sustain the charge of fraud. We find no reason to differ with the trial court on its finding. There is no fraud charged or attempted to be proven against Belding respecting the satisfaction of the trust deed. So far as the proof shows, Belding undoubtedly expected to borrow money and to enter into a cattle speculation with Seymour but was unable to do so to the extent and in the manner contemplated. The evidence as to any fraudulent participation of Mackay in the cancellation of said trust deed is wholly insufficient to authorize a decree declaring said cancellation void. The evidence shows that Mackay had no knowledge of the existence of said trust deed; that he had two abstracts of said land, neither of which showed such trust deed. The only action taken by him in relation to the borrowing of money by Seymour was a certificate signed by him that he considered the Belding farm worth \$75 per acre. Belding testifies that he advised him not to borrow of the life insurance company, that he would loan him what he needed to buy cattle, and that thereupon he gave up the project of borrowing of the life insurance company. That Mackay furnished \$1,000 for that purpose and refused to furnish any more. Mackay testifies that he agreed to furnish Belding but \$1,200 and that he did furnish that. The release of the trust deed was made with the knowledge and consent of John W. Seymour, who testifies: "I knew of it at the time it was done. It was arranged between

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Belding and myself that the trust deed should be released for the purpose of allowing him to raise the money to carry out his arrangement with me to purchase cattle, in which cattle I was to have an interest, or partnership, in lieu of the amount secured by the trust deed. But as Belding failed to carry out his arrangement to give me an interest in the cattle, neither my wife nor myself received any consideration whatever for releasing the trust deed." In 1874 Seymour testified: "I settled up with Belding on open account, which ran through the time I was at his place in the spring of 1870 to the spring of 1872, and as there had been numerous indorsements on the note mentioned in the trust deed it was thought best to figure up the interest and draw a new note covering the entire amount." In 1876 another note was taken, and the note given in 1874 was given up. This last note has been merged in a judgment and *fi. fa.* issued and levied on the land embraced in the trust deed. The taking of this note with a full knowledge of the release of the trust deed, and of Belding's failure to comply with his arrangement with Seymour, as stated *supra*, was a ratification of said release. The intention as shown by the attending circumstances was that the new note should be a payment of the old note, and this intention should prevail. 2 Jones on Mortgages, Sec. 926, and cases cited in note. We are unable, after a careful consideration of this record, to find proof sufficient to authorize a reversal of the decree in this case. The decree of the court is fully sustained by the proof.

Decree affirmed.

Town of Geneva v. Peterson.

TOWN OF GENEVA

V.

S. J. PETERSON AND CHRISTINA PETERSON.

Municipal Corporations—Street Improvement—Injury to Private Property—Measure of Damages—Special Benefits—Instructions—When Great Accuracy is Required.

1. In an action against a municipal corporation for damages alleged to have resulted from a street improvement to private property, the jury should take into consideration the special benefits to the plaintiffs, distinguished from the benefits to the public in general.

2. Where the testimony is conflicting, the instructions should be accurate and clear. It is not sufficient that a necessary qualification of an instruction given may be found in the instructions given for the opposite party.

[Opinion filed December 11, 1886.]

APPEAL from the Circuit Court of Kane County; the Hon. CHARLES KELLUM, Judge, presiding.

Mr. CHARLES WHEATON, for appellant.

The only question in this class of cases upon the measure of damages is: Is the property in fact depreciated in value by the grading? The question to be determined is: What would the property have sold for unaffected by the grading, and what would it sell for as affected by it; would it sell for less? Page v. C., M. & St. P. R. R. Co., 70 Ill. 324; Eberhart v. C., M. & St. P. R. R. Co., 70 Ill. 347; J. & N. W. R. R. Co. v. Walsh, 106 Ill. 253; C. & E. R. R. Co. v. Jacobs, 110 Ill. 414.

Any benefits conferred, as well as injury inflicted, should be considered in estimating the damages. City of Elgin v. Eaton, 83 Ill. 535; C., M. & St. P. R. R. Co. v. Hall, 90 Ill. 42; Shawneetown v. Mason, 82 Ill. 337; C. & P. R. R. Co. v. Francis, 70 Ill. 238. The jury in such case should always take into consideration the special benefits in contradistinction to the benefits upon the public in general.

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The plaintiffs' instructions must stand by themselves, and if they, or any one of a series of them, are erroneous, then for such error a judgment will be reversed. In a case where the evidence is conflicting, the fact that the law is accurately stated on one side will not obviate errors in instructions given on the other side. *I. C. R. R. Co. v. Maffit*, 67 Ill. 431; *Village of Warren v. Wright*, 3 Ill. App. 602.

An instruction which ignores a principle involved in the case is erroneous. *C. & N. W. R. R. Co. v. Clark*, 70 Ill. 276; *Thorne v. McVeagh*, 75 Ill. 81; *C., B. & Q. R. R. Co. v. Griffin*, 68 Ill. 499; *Am. Ins. Co. v. Crawford*, 89 Ill. 62; *Cushman v. Cogswell*, 86 Ill. 62; *Wabash Ry. Co. v. Henks*, 91 Ill. 406; *Mendota v. Fay*, 1 Ill. App. 418.

Where a verdict is against the weight of evidence, or is too large, or the evidence is conflicting, and the instructions for plaintiffs had a tendency to mislead the jury, the judgment will be reversed. *Adams v. Smith*, 58 Ill. 417; *Carter v. Carter*, 62 Ill. 439; *Herrick v. Gary*, 65 Ill. 101; *Frantz v. Rose*, 89 Ill. 590; *Cushman v. Cogswell*, 86 Ill. 62.

Messrs. R. N. BOTSFORD and HOPKINS, ALDRICH & THATCHER, for appellees.

The instructions as a whole, fairly and correctly stated the law of the case. At least the defendant has no ground of complaint on that score.

Complaint is made that the second instruction given for the plaintiffs is not the law. Standing alone, the criticism of counsel for the defendant upon it may be just; but the court should bear in mind that all through the trial, witnesses, both on the direct and cross-examinations, with one or two exceptions, were closely directed to the damages as affecting the market value of the property by the improvement. All the other instructions given on both sides kept this fact prominently in view.

If all the instructions are considered, it will be found that the prominent, positive and controlling idea all through them is to direct the jury with unerring certainty to the proper measure of damages.

In criminal cases the Supreme Court holds that "it is suffi-

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cient when the instructions, considered as a whole, substantially present the law of the case fairly to the jury." *Ritzman v. People*, 110 Ill. 362; and this has been the rule in civil cases, *Gilchrist v. Gilchrist*, 76 Ill. 281; *Lovenguth v. City of Bloomington*, 71 Ill. 238.

There was no pretense on the trial, nor does the record show that any special benefit to the public generally or other property owners on this street, was sworn to by any witness who testified in the case.

On the other hand it is claimed, and the proof is, that plaintiffs' property was specially damaged and depreciated in its market value by the grading, and these were the only damages claimed on the trial or sought to be recovered for.

WELCH, J. This was a suit brought by the appellees, as owners of a lot on State Street, in the Town of Geneva, to recover damages claimed to have been caused to the premises by the grading of State Street and lowering the sidewalk in front of the premises. A verdict for the sum of \$725 for appellees was rendered by the jury. A remittitur of \$325 was entered by the appellees, and judgment entered for the sum of \$400 and costs, from which this appeal is taken. Various errors are assigned. Art. 2, Sec. 13, of our present Constitution, declares that private property shall not be taken or damaged for public use without just compensation. The property in this case was private and the improvement being made was for public use, and if the appellees' property was damaged thereby, they are entitled to just compensation for such damages. The question then presents itself, what was the measure of damages? In the case of *Shawneetown v. Mason*, 82 Ill. 337, it was said: "The true question is, whether the property was injured by the improvement; if not, then there is no damage, and can be no recovery. If there is, then the recovery must be measured by the extent of the loss. If the property is worth as much after the improvement as before, then there is no damage done the property. If the benefits received from making the improvement are equal to or greater than the loss, then the property is not damaged for public use. We apprehend that

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there can be no damage to property without a pecuniary loss. *City of Elgin v. Eaton*, 83 Ill. 535. "The jury should always in such cases take into consideration the special benefits, in contradistinction to the benefits to the public in general." There was in this case a sharp conflict in the evidence on the question as to the amount of damages, if any, sustained by the appellees. In such a case the law should be accurately stated in the instructions. It is insisted by counsel for appellant that the second instruction given for appellees ignored the idea of any special benefits to appellees being considered by the jury. And the jury was told by that instruction that the appellees were entitled to recover for all damages sustained, if any, over and above the benefits to the public generally. The instruction is as follows:

2d. The court further instructs the jury that under the law of this State as it was at the time said grading was done on State Street, private property could not be taken or damaged for the benefit of the public, without making compensation therefor to the owner of such property. Hence, in this case, if the jury believe from the evidence that in consequence of the grading of the street the plaintiffs were damaged over and above any benefits shared by them with the public generally, then they are entitled to recover in this action for such damages, and the jury should so find and fix the amount by their verdict at such sum as the proof shows, if any, they are entitled to receive.

It is conceded by counsel for appellees that that instruction standing alone, the criticism of counsel for appellant upon it may be just. It is insisted that the eighth instruction given for appellees cured the error in the second. The eighth instruction is as follows: Eighth. The question for the jury in this case is, were the premises of the plaintiffs damaged by the grading of State Street? and if the jury believe from the evidence that said premises by reason of such grading were damaged over and above any benefits received by such grading, and that such damages are permanent and substantial damages to said premises, then the jury should find for the plaintiffs such a sum as the proofs show they have sustained, not exceeding the amount claimed in the declaration.

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What benefits are referred to in this instruction is not stated. The jury would naturally infer that the benefits referred to meant the same as stated in the second instruction, *supra*, to wit: "Benefits to the public generally." The right of the jury to regard special benefits to the property as against any claim for damages, is not distinctly stated in any of the instructions given for appellees. It is, however, insisted by counsel for appellees that it is sufficient when the instructions, taken as a whole, substantially present the law of the case to the jury, and we are referred to the following authorities: *Lovenguth v. City of Bloomington*, 71 Ill. 238; *Gilchrist v. Gilchrist*, 76 Ill. 281; *Ritzman v. People*, 110 Ill. 362. The rule announced in 71 Ill. 238, was: "A judgment will not be reversed on account of an instruction given which is not applicable to the case, when it appears it could do no harm, and the party objecting to it has not been prejudiced by it." The rule announced in 76 Ill. 281, was: "Although there may be objections to part of the instructions given when criticised, yet if taking them together as a whole the law of the case is fairly presented and justice is done by the verdict, the judgment will not be reversed."

The same rule as in 76 Ill. 281, is announced in *Ritzman v. People*, 110 Ill. 362. We do not understand the authorities above to conflict with the rule announced by the Appellate and Supreme Court of the State.

Where the testimony in a case is conflicting, the instructions should be accurate, clear and perspicuous. It is not sufficient that the necessary qualifications of them may be found in the instructions given for the opposite party. *Village of Warren v. Wright*, 3 Ill. App. 602; *Harvey, Wolfe & Co. v. Miles*, 16 Ill. App. 533; *Peoria & Pekin Union Ry. Co. v. O'Brien*, 18 Ill. App. 28; *Denman v. Bloomer*, 11 Ill. 177; *Keokuk Packet Co. v. Henry*, 50 Ill. 264; *I. C. R. R. Co. v. Maffit*, 67 Ill. 431; *Cushman v. Cogswell*, 86 Ill. 62; *Wabash Ry. Co. v. Henks*, 91 Ill. 406. Under the rule as announced in the authorities, *supra*, this judgment must be reversed for the error of the Circuit Court in giving second instruction for appellees.

We do not deem it proper to comment upon the evidence

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further than to say it was highly conflicting. We do not consider the objections to the admission of evidence well taken. For the errors herein indicated this judgment is reversed and cause remanded.

Reversed and remanded.

CITY OF AURORA
V.
BENJAMIN F. PARKS.

21	459
75	202
21	459
189	359

Municipal Corporations—Sidewalks—Personal Injuries Caused by Slipping on Snow and Ice—Liability—Instructions—Where Great Accuracy is Required.

1. To render a municipal corporation liable for personal injuries caused by slipping on snow and ice on its sidewalk, the ice and snow must have accumulated to such an extent as to cause an obstruction. Mere slipperiness and unevenness, caused by tramping, thawing and freezing, where the ice and snow has not accumulated to such an extent as to make it an obstruction, does not create a liability.

2. Where the testimony is conflicting, the instructions should be accurate and clear.

[Opinion filed December 11, 1886.]

APPEAL from the Circuit Court of Kane County; the Hon. CHARLES KELLUM, Judge, presiding.

Messrs. CHARLES WHEATON and C. L. ALLEN, for appellant.

A city is not required to have its sidewalks so constructed or kept in such condition as to secure immunity from injury in using them, nor is it bound to employ the utmost care and exertion to that end. It is only required to see that its sidewalks are reasonably safe for persons exercising ordinary care and caution in using them. *City of Chicago v. McGiven*, 73 Ill. 347; *Chicago v. Bixby*, 84 Ill. 82; *City of Macomb v. Smithers*, 6 Ill. App. 470.

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A city is not an insurer against accidents. *City of Chicago v. Bixby*, 84 Ill. 82; *Gibson v. Johnson*, 4 Ill. App. 288; *City of Macomb v. Smithers*, 6 Ill. App. 470.

Obstructions or defects in the streets or sidewalks of a town or city, to make the corporation liable for injury occasioned thereby, must be of such a nature that they are in themselves dangerous and can not be readily detected, or such that a person exercising ordinary prudence can not avoid danger or injury in passing over them. *City of Quincy v. Barker*, 81 Ill. 300.

The mere slipperiness of a sidewalk, occasioned by ice or snow, not being accumulated so as to constitute an obstruction, is not such a defect as will make the city liable for damages occasioned thereby. *City of Chicago v. McGiven*, 78 Ill. 347; *Village of Gibson v. Johnson*, 4 Ill. App. 288; *City of Macomb v. Smithers*, 6 Ill. App. 370.

A corporation is not liable for injuries occasioned by slipping on ice or snow on sidewalks, unless the walks have become notoriously dangerous thereby. *Stanton v. Springfield*, 12 Allen, 566; *Nason v. Boston*, 14 Allen, 501; *Stone v. Hubbardstown*, 100 Mass. 50; *Smyth v. Bangor*, 72 Me. 249; *Landolt v. Norwich*, 37 Conn. 615; *Borough of Mauch Chunk v. Kline*, 100 Pa. St. 119; *Cook v. Milwaukee*, 24 Wis. 270; *Ward v. Jefferson*, 24 Wis. 342.

A small ridge of snow and ice of inconsiderable size is not an obstruction, within the meaning of the law. *Street v. Holyoke*, 105 Mass. 32; *Mauch Chunk v. Kline*, 100 Pa. St. 119.

In a case where the evidence is conflicting the fact that the law is accurately stated on one side will not obviate errors in instructions given on the other side. *I. C. R. R. Co. v. Maffit*, 67 Ill. 431; *Village of Warren v. Wright*, 3 Ill. App. 602.

Each instruction must be in itself correct in this class of cases. *Village of Warren v. Wright*, 3 Ill. App. 602; *C. & A. R. R. Co. v. Murray*, 62 Ill. 326; *Baldwin v. Killian*, 63 Ill. 550; *C., B. & Q. R. R. Co. v. Payne*, 49 Ill. 449; *Quinn v. Donovan*, 85 Ill. 194; *Ill. Linen Co. v. Hough*, 91 Ill. 63; *Joliet v. Walker*, 7 Ill. App. 267.

Messrs. R. N. BOTSFORD, T. C. MOORE and N. J. ALDRICH, for appellee.

The burden was upon the City of Aurora to maintain sidewalks and keep them from being obstructed, and in such a condition that a person using ordinary care and prudence could pass over them in safety. The Supreme Court of this State has in a number of cases held that such was the rule of law; and also, that if the sidewalk was dangerous and appellee was using ordinary care in passing over it, and was injured while so doing, the appellant is liable to the full extent of such injury. And the law is so well settled that it hardly seems necessary to quote any cases, but we will suggest the following: *Centralia v. Scott*, 59 Ill. 129; *Sterling v. Thomas*, 60 Ill. 264; *Bloomington v. Bay*, 42 Ill. 503; *Champaign v. Patterson*, 50 Ill. 61; *Aurora v. Pulfer*, 56 Ill. 270; *Aurora v. Dale*, 90 Ill. 46; *Aurora v. Hillman*, 90 Ill. 61.

It is the duty of the City of Aurora to keep its sidewalks free from obstructions by snow and ice that impede travel and render them dangerous, and the occupants or owners of adjoining premises can not be compelled to keep the walks in front thereof free from snow and ice. *Gridly v. Bloomington*, 88 Ill. 554; *City of Chicago v. O'Brien*, 111 Ill. 532.

Aside from the decisions in our own State, the following cases have determined the liability of cities to persons falling from icy sidewalks, so formed by the freezing of melted snow, making a rough and uneven surface. *McSully v. Boston*, 113 Mass. 503; *Cook v. Milwaukee*, 24 Wis. 270; *Luther v. Worcester*, 97 Mass. 268; *Hutchins v. Boston*, 97 Mass. 272; *Hall v. Lowell*, 10 Cush. 260; *Shea v. Lowell*, 10 Allen, 136; *Payne v. Lowell*, 10 Allen, 147; *Providence v. Clapp*, 17 How. 164.

Although an instruction considered by itself is too general, yet if properly limited by others given on the other side, so that it is not probable it could have misled the jury, judgment will not be reversed on account of such instruction. *Kendall v. Brown*, 86 Ill. 387; *Skiles v. Caruthers*, 88 Ill. 458; *Edwards v. Cary*, 60 Mo. 572; *T., W. & W. Ry. Co. v. Ingraham*, 77 Ill. 309.

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WELCH, J. This was an action brought by the appellee against appellant to recover damages for an injury received by him from a fall upon one of the appellant's sidewalks on the evening of the 6th of January, 1884. There was a verdict for the appellee for \$5,000. Motion for a new trial; motion overruled and judgment, from which this appeal is taken; various errors are assigned.

The appellee in his declaration avers that the appellant, in gross violation of its duty, permitted snow and ice to accumulate on its sidewalk, near the corner of Galena and River Streets, on the west side of River Street, so as to form an obstruction and become dangerous to travel; that he, in passing over and along said sidewalk, at about 7 o'clock p. m., January 6, 1884, in the exercise of reasonable care and caution, fell, by reason of the accumulation of ice and snow thereon, and injured his left hip and the sciatic nerve thereof permanently. There is no defect in the construction of the walk claimed. The evidence shows that the walk, where the appellant fell, was much used; that the appellee had, during the month of December, and up to the time he fell, passed over that walk from four to five times daily, and on the day he fell had passed over it five times; and that during the month of December and up to the 6th of January there had been a snow fall of twenty-three and three-tenths inches. The evidence in regard to the amount of snow and ice that had accumulated on the sidewalk was conflicting. The evidence on the part of the appellant tended to show that there was not snow or ice upon the walk sufficient to cause an obstruction to travel; that there might have been an inch as stated by some, and, as stated by others, a "thin coating of ice and snow was formed upon the walk of the thickness of a boot sole." All of these witnesses had passed over this walk several times daily. Some of the evidence on the part of appellee tended to show that the snow as it fell was packed down by pedestrians until it became smooth, icy and slippery, with little knolls worn smooth, and that there was from two to three inches of snow in the center of the walk. If this was the condition of the walk there was no liability on the part of appellant. Yet, under the 4th and

5th instructions given for the appellee the jury may have believed that this was the condition of the walk, and have been justified under these instructions to find for the appellee. The instructions were as follows :

4th. "If the jury believe from the evidence that the plaintiff was injured by reason of the defendant negligently failing to keep the sidewalk in question in a reasonably safe condition for travel over the same but allowed snow and ice to accumulate thereon, so as to make the same unsafe and dangerous to persons using ordinary care and prudence having occasion to pass over the same, and suffered the same to so remain, with notice thereof, or for such length of time as by proper care and diligence they might have known of its condition, then the city is liable in this action, and the jury should so find."

5th. "If the jury believe from the evidence that the sidewalk in controversy, at the point where the alleged injury occurred, on the 6th day of January, A. D. 1884, the time when said injury occurred, had become dangerous from deposits of ice and snow, and the surface of said walk had become rough and uneven on account thereof, and that such had been the condition for an unreasonable length of time before the alleged injury, and was so at the time of the injury, and that plaintiff, while passing over the same, and in the exercise of ordinary care and prudence, slipped and fell and injured his leg or hip, then the plaintiff is entitled to recover damages for such injury, and the jury should so find."

They authorized the jury to find for appellee, if the sidewalk was unsafe and dangerous from ice and snow accumulated thereon, even though it had not accumulated to the extent to cause an obstruction. There may have been sufficient ice and snow on the walk to make it slippery, rough, uneven, dangerous and unsafe, and yet the appellant not be liable. To render the appellant liable, the ice and snow must have accumulated to such an extent as to cause an obstruction. Mere slipperiness and unevenness caused by the tramping, thawing and freezing, where the ice and snow has not accumulated to such an extent as to make it an obstruction, does not create a liability.

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These instructions are in conflict with the rule announced by the Appellate and Supreme Courts of this State. The Village of Gibson v. Johnson, 4 Ill. App. 288; City of Macomb v. Smithers, 6 Ill. App. 47; City of Chicago v. McGiven, 78 Ill. 347; City of Quincy v. Barker, 81 Ill. 300; City of Chicago v. Bixby, 34 Ill. 82. They should not have been given.

The evidence being conflicting, the law should have been accurately stated. Ill. Central R. R. Co. v. Maffit, 67 Ill. 431; Village of Warren v. Wright, 3 Ill. App. 602.

It is also insisted by the appellant that the damages are excessive. We do not feel called upon to examine or discuss that question, as this case will have to be re-tried. For the errors indicated, the judgment is reversed and cause remanded, and *venire de novo* awarded.

Reversed and remanded.

LESTER P. WOOD

V.

JOHN CLARK ET AL.

Replevin—Sale, by Agent of Debtor in Failing Circumstances, to Sureties—Preferences—Authority of Agent—Construction of Contract—Contingency—Fraud—Instructions—Practice.

1. Fraud is not to be presumed but must be proved by facts and circumstances in the case. The law presumes any business transaction to be honest until the contrary is shown.

2. It is not error to refuse an instruction though it may contain a correct proposition, when its substance is contained in another instruction, given at the instance of the same party.

3. In an action of replevin, brought by certain creditors of the original owner of goods claimed by them as purchasers from the agent of said owner, against an officer who holds under writs of attachment sued out by other creditors of said owner, it is *held*: That the agent was authorized to make any disposition of the property which his principal might have made; that the principal, though in failing circumstances, might in good faith have preferred particular creditors, and made a sale to them in consideration of

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claims; that he might have given preference to his sureties upon their obligations; that said sureties had the right to secure payment of their obligations in preference to other creditors; that the contract of sale made by the agent was subject only to the contingency of other creditors successfully contesting it; that the evidence does not show said transaction to have been fraudulent or entered into with the intent to hinder and delay creditors, and that there was no error in giving or refusing instructions.

[Opinion filed December 11, 1886.]

APPEAL from the Circuit Court of De Kalb County; the Hon. C. W. UPTON, Judge, presiding.

Statement of the case by WELCH, J. Peter H. Evans, prior and up to the 29th day of January, 1885, had been engaged in the sale of agricultural implements, wagons, sewing machines, lumber, etc., at Somonauk in DeKalb County, Illinois. During the time he was thus doing business he had procured John Clark and Stephen D. Wright, two of the appellees, to sign notes for him as sureties. Clark had signed three notes, each for the sum of \$875, and interest, payable to John McNamara. Wright had signed as surety for him a note for \$1,000 and interest, payable to Anthony Harmon. Evans had also become indebted to the Somonauk Bank on a note for \$340 and interest. He was also at the time indebted to a number of other parties, among them the attaching creditors, The McCormick Harvesting Machine Company, J. J. Budlong & Co., Kelley, Rathbone & Co. and C. C. Thompson & Walkup Co. On the 29th day of January, 1885, he left Somonauk, leaving his brother, John F. Evans, in full charge of his business, saying to him when he left that he was in a bad condition financially, and that if he could not get out of it he wanted to be sure and have John Clark and Stephen D. Wright secured; that if he did not make satisfactory arrangements in Chicago he would send him authority from there to settle up his business satisfactory to his wishes. He never returned and his whereabouts is unknown. On the 31st of January he sent to his brother from Chicago a letter, inclosed in which was the following paper, which is marked "Exhibit A."

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SOMONAUKE, Jan. 26, 1885.

"This is to certify that my brother, John F. Evans, has my consent and is authorized to transact all of my business while I am away, and I shall be responsible for the same.

(Signed)

P. H. EVANS."

On the 4th of February John Evans met with John Clark, Stephen D. Wright and Harrison Wright who represented the Somonauk Bank at the house of John Clark. The meeting was for the purpose of securing John Clark and Stephen D. Wright as the sureties on the notes of P. H. Evans, and to secure the Somonauk Bank for the note due from P. H. Evans. The amount of the notes and interest which was to be secured amounted to the sum of \$4,197. The amount of the property turned over to the appellees by John F. Evans for P. H. Evans at the invoice price was \$4,696.86. The sum of \$500 was deducted from the invoice price, owing to the unsalable character of a large amount of the property. A bill of sale was given to the appellees for the property thus turned out, signed P. H. Evans, by John F. Evans, agent.

The property was taken possession of by the appellees the next morning, and was in their possession when seized by the appellant under writs of attachment on the 7th day of February.

Messrs. JOHN L. PRATT, A. J. HOPKINS, N. J. ALDRICH and F. H. THATCHER, for appellant.

Messrs. CHARLES WHEATON and LUTHER LOWELL, for appellees.

WELCH, J. This was an action of replevin, by appellees against the appellant, to recover this property. Appellant filed several pleas: *Non cepit, non detinet*, property in P. H. Evans, and justification as Sheriff under writs of attachment. Replications were filed to the pleas. Trial, verdict for the appellees and judgment on the verdict. From which judgment this appeal is taken, and various errors are assigned.

The question in controversy in this case is, as to who was

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entitled to the property. It is insisted by the counsel for the appellant that John F. Evans did not have authority to dispose of this property to the appellees in the manner that he did, and that the transaction was fraudulent, and was made to hinder and delay the creditors of P. H. Evans. There seems to have been two directions given by P. H. Evans to John F. Evans, one verbally, the other in writing.

John F. Evans states that at the time his brother, P. H. Evans, left him in charge of his business, he told him of notes signed by him, on three of which John Clark was surety, and on one of which Stephen D. Wright was surety, and that he was in a bad condition financially, and that if he could not get out of it he wanted to be sure and have John Clark and Stephen D. Wright secured, and that he had a paper written out, which, if he did not make the arrangement in Chicago satisfactorily, he would send him the paper, so that he could have authority to settle up his business satisfactorily. That he told him to be sure and secure these two parties, then settle with the rest of them the best he could. The written authority is that contained in exhibit "A." We hold that under the authority given by P. H. Evans to John F. Evans, that John F. Evans had a legal right to make any disposition of the property of P. H. Evans that P. H. Evans could have made himself. He was made his general agent, and left in full possession and control of the business and property. He had verbal directions and authority what to do in regard to the sureties of P. H. Evans and his creditors. He had also full powers conferred by the written authority contained in the exhibit "A." P. H. Evans had the legal right, acting in good faith, to prefer a particular creditor, and to have made a sale to a creditor who was seeking to secure his debt in good faith in preference to other creditors of his. *Morris v. Tillson*, 81 Ill. 607. He had the right to have given preference to a surety upon his obligation. *Nicholas Welsch et al. v. Anton Werschem*, 92 Ill. 115. There is no question as to the *bona fide* character of their claims and demands. Clark and Wright were his sureties to the extent claimed, and his indebtedness to the Somonauk Bank was of the amount claimed.

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The appellees had the right to be secured or paid in preference to any other of the creditors of P. H. Evans, and P. H. Evans or his agent, John F. Evans, had the right to secure or pay them in preference to any of the creditors.

Was the transaction fraudulent and done for the purpose of hindering and delaying the creditors of P. H. Evans? We have held that the claims were *bona fide*, and that the appellees had the right to be secured or paid. Was the property turned out for the real purpose of paying or securing them? The value was fixed to each article of property turned over, at the original invoice price, and after an amount equal to that of appellees' demands was reached it was insisted by John F. Evans that appellees should accept that amount. They refused, and Clark told him that he would be willing to give \$1,000 if any one would let him out of it sooner than take any of the property. It was then agreed that they should have the property at the invoice price, to the amount of \$500 more than their claims amounted to, for the reason as stated "that a large amount of the stuff was unsalable."

This property was received and accepted by the appellees on these terms.

"We hereby agree that if the title to the property this day sold us by P. H. Evans, per his agent, John F. Evans, shall remain in us and not be replevied or attached, or levied upon by other creditors of P. H. Evans, or said sale to us declared void by a jury or the courts, that we will as soon as all of said property shall have been sold by us, deliver to said P. H. Evans three notes, signed by John Clark as surety with said Evans, now amounting to \$2,835; also, one note signed by S. D. Wright, as surety with said Evans, now amounting to \$1,007; and also one note in the Somonauk Bank, now amounting to \$355, signed by P. H. Evans and John McNamara.

JOHN CLARK,
S. D. WRIGHT,
JOHN CLARK, President,
for Somonauk Bank.

SOMONAUK, ILL., Feb. 4, 1885."

This differs from a technical pledge only in the fact that

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there was to be no redemption by the person turning out the property, and in case of the contingency mentioned in the writing not happening, the property was to be taken in full liquidation of the debt, and notes given up for which it was turned out. It provides that as soon as all the property shall have been sold the notes were to be delivered up.

It is insisted by counsel for appellant, that by the terms of this contract, if any other creditor replevied or attached the goods now in controversy, it was no sale, and the property reverted to P. H. Evans. We hold that the contract is susceptible of no such construction; the construction to be given to the contract is, that if the appellees should not be deprived of the title to the property, but the title should remain in them, and they should have the benefit of the property or its proceeds, then the notes were to be given up, and they were to take the property for the amount of the claims. There was but one contingency, and that was that the property should not be taken away from them and they deprived of the benefits of it.

We are unable to perceive from the evidence in this record that this transaction was fraudulent, or entered into with the intent to hinder and delay the creditors of P. H. Evans. This was a proper question for the jury, and we concur in the conclusion reached by them. It is further insisted by counsel for appellant that the court erred in giving the fourth, fifth and seventh instructions for the appellees, and refusing certain instructions asked by appellant. We will consider the fourth and seventh instructions given for the appellees together, as they each involve the question of authority. The seventh was predicated on the paper marked "Exhibit A," and the jury was told that that paper authorized John F. Evans to transact all of the business of P. H. Evans, and that under that authority John F. Evans would have a right to pay or secure the creditors of P. H. Evans, the same as P. H. Evans would if he was transacting the business, and the fourth instruction directed the jury that if they believed John F. Evans had authority from P. H. Evans to attend generally to his business, that that was sufficient authority to make the disposition of the property he did.

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These instructions are in harmony with what we have heretofore said in regard to the authority given by P. H. Evans to John F. Evans, and what John F. Evans had the right to do under that authority. There was no error in giving them. The fifth instruction in effect informed the jury that fraud is not to be presumed, but must be proved by facts and circumstances in the case, and the law presumes any business transaction to be honest until the contrary is shown by proof or circumstances proven in evidence. This instruction announced the law correctly. Appellants could not have ~~been~~ injured by said instruction under the evidence in this case, as there was no evidence tending to show fraud. The first and fifth instructions refused for appellant, gave this instruction to the paper signed by the appellees and the bill of sale signed P. H. Evans, by John F. Evans to appellees, that on the levy of the attachments set up by appellant that the appellees were relieved from all liability to pay P. H. Evans for said property, and such conveyance became and was void as to attaching creditors. We do not feel called upon to say more than we have heretofore said as to the proper construction of said paper. These instructions being in conflict therewith, we hold that they were correctly refused.

The third refused instruction for appellant was properly refused. There was no evidence on which to base the question of reasonable time. The appellees came into possession of the property on the 5th day of February, and it was levied on by the appellant on the 7th of February. It had only been in their possession two days. The fourth refused instruction for the appellant, so far as it announced the law, had been given in other instructions, and the same may be said of the sixth refused instruction. It is not error to refuse an instruction though it may contain a correct proposition, when the substance of it is contained in another instruction, given at the instance of the same party. *Curtis W. Boylston et al. v. Samuel Bain et al.*, 90 Ill. 283.

There was no error in the giving or in the refusal of instructions. The law was correctly given to the jury. The verdict of the jury gave substantial justice. The judgment is affirmed.

Affirmed.

THE NORTHWESTERN BENEVOLENT AND MUTUAL AID
ASSOCIATION

V.

BRIDGET E. CAIN.

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21	471
108	1546

Life Insurance—Statements as to Condition and Habits—Whether Representations or Warranties—Distinction—Review of Authorities—Instructions—Practice—Examination of Witness out of Order—Discretion.

1. In an action upon a certificate of membership in a mutual aid association, it is *held*: That the statements made by the insured in regard to his condition and habits are representations, and not warranties; that it is sufficient if they were made in good faith, although some one or more of them may have been untrue, and that there was no error in the refusal of the court below to give certain instructions which treated such statements as warranties.

2. An instruction asked by the defendant which is more comprehensive than any of his pleas should be refused.

3. Whether the examination of a witness shall be permitted out of the usual and regular order is within the discretion of the trial court.

[Opinion filed December 11, 1886.]

APPEAL from the Circuit Court of Marshall County; the Hon. T. M. SHAW, Judge, presiding.

Statement of the case by WELCH, J. This was an action of assumpsit brought by appellee against appellant upon a certificate of membership issued by the appellant to Thomas W. Cain, on the 14th day of May, 1883, by which the sum of \$2,500 was to be paid within sixty days after the death of said Cain, to his wife, the plaintiff below and present appellee.

The certificate of membership at its conclusion contains the following clause: "This certificate is issued upon the condition that the said Thomas W. Cain shall comply with the constitution and by-laws of this association and that the statements in the application for this certificate are true." To the declaration the appellant filed several special pleas, in which it was set up by way of defense that the certificate issued was based

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upon the application in writing for membership in the said association made by said Thomas W. Cain, in which, among other things, he made untrue representations in regard to his condition and habits as follows:

1. To the question, do you believe yourself to be free from all disease, hereditary or otherwise, tending to shorten life?

A. Yes.

2. Has your general health been uniformly good for the past ten years? A. Yes.

3. If you use alcholic or other stimulants, opium or other narcotics, state which one, how long, and to what extent; answer fully. A. Beer, moderately.

4. Have you personally consulted a physician, been prescribed for, or professionally treated within the past ten years?

A. Yes.

If so, give dates, and for what disease. A. For nervousness, about ten years ago.

Name and residence of that physician? A. Dr. Downey, Wenona.

5. Do you agree that the habitual use of alcholic drinks, opium or other stimulants to an excess, liable to permanently injure your health, shall render this contract null and void? A. Yes.

To the pleas setting up the untruthfulness of the representations made in the application, in respect to the questions and statements above quoted, replications were filed taking issue.

Verdict and judgment for the appellee, from which this appeal is taken.

Messrs. McNULTA & WELDON, HAMILTON SPENCER and JOHN H. JACKSON, for appellant.

The first question which arises in this case is, whether the statements made by Cain, in his application for membership, are warranties, and if they were in any respect untrue, whether such want of truthfulness avoids the contract between the parties. If those statements are warranties, then, by the terms of the contract between the parties as shown by the agreement contained in the application and the condition in

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the certificate of membership, whether bearing directly or not upon the risk, will be sufficient to avoid the contract of insurance. The parties chose to make a contract for themselves. They fix its terms and conditions, and agree as to what false representations shall render the contract void. This agreement no court has power to change or modify. We think this proposition is abundantly established by the cases cited below. *Hartman v. Keystone Ins. Co.*, 21 Pa. St. 466; *Jeffreys v. Economical Ins. Co.*, 22 Wall. 47; *Anson on Contracts*, 141; *May on Insurance*, Sec. 156.

No particular form of words is necessary to constitute a warranty. Any statement or stipulation upon a literal truth or fulfillment of which, in the intention of the parties, the validity of the contracts is made to depend, whether appearing as a condition or warranty, or however otherwise, amounts to a warranty. Whenever the statements made in the application are referred to in the policy itself, and by express terms are made part of it, or they are declared to be the basis upon which it is made, or the policy is declared to be issued upon the faith thereof, there can be no doubt that such statements and stipulations are embraced in, and constitute part of the policy. *May on Insurance*, Sec. 158, and cases cited.

But even assuming that these statements are to be treated only as representations, and not warranties, they, nevertheless, are material representations, and the difference in legal effect between representations thus made and warranties is important, if indeed there be any. *Price v. Phoenix Ins. Co.*, 17 Minn. 497.

Messrs. EDWARDS & EVANS, for appellee.

WELCH, J. The first question which we shall consider is whether the statements made by Cain in his application for membership are warranties, and if they were in any respect untrue, whether such want of truthfulness avoids the contract between the parties.

The application in the case of the Illinois Masons' Benevolent Society v. Charles E. R. Winthrop, Adm'r etc., 85 Ill. 537,

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contained this provision: "It is hereby declared that the above are true and fair answers to the foregoing questions, in which there is no misrepresentation or suppression of known facts, and I acknowledge and agree that the above statements shall form the basis of the agreement with the society." This was held to be a representation and not a warranty. In the policy in the case of *Price v. Phoenix Mutual Life Ins. Co.*, 17 Minn. 497, it was provided, and "declared to be the true intent and meaning of this policy, and the same is accepted upon these express conditions, that * * * if any of the declarations or statements made in the application for this policy, upon the faith of which this policy is issued, shall be found in any respect untrue, then and in every such case this policy shall be null and void."

The court in that case held the answers to the questions in the application to be representations and not warranties and that it was sufficient if they were substantially true. In *Campbell v. New England Mutual Life Ins. Co.*, 98 Mass. 381, the court say: "In considering the question whether a statement forming a part of the contract is a warranty it must be borne in mind as an established maxim that warranties are not to be created or extended by construction. They must arise, if at all, from the fair interpretation and clear intendment of the words used by the parties.

"When, therefore, from the designation of such statements as statements, or as representations, or from the form in which they are expressed, there appears to be no intention to give them the force or effect of warranties, they will not be so considered."

In that case it was provided that the amount of the policy should be payable "upon the following conditions (among others):" "If the statements by or in behalf of or with the knowledge of the said assured to said company as the basis of or in the negotiation for this contract shall be found in any respect untrue then the policy shall be null and void." After answering the various questions propounded in the application to him he said, "the foregoing are full, fair and true answers to the questions proposed," and it was signed by him. These

statements of the policy and application combined were held to give the answers in the application only the force of representations and not warranties. In the case of *Monlor v. American Life Ins. Co.*, 111 U. S. 335, the application contained the following agreement:

“It is hereby declared and warranted that the above are fair and true answers to the foregoing questions; and it is acknowledged and agreed by the undersigned that this application shall form part of the contract of insurance, and that if there be in any of the answers herein made, any untrue or evasive statements, or any misrepresentation or concealment of facts, then any policy granted upon this application shall be null and void, and all payments made thereon shall be forfeited to the company.”

The Circuit Judge on the trial of this case before a jury held the statements in this application warranties, and charged that if his answers were untrue to certain questions, and notwithstanding he may have ignorantly and honestly made the answers, the policy was void and no recovery could be had upon it. This charge the Supreme Court say was in effect holding the statements in the application to be warranties, and that in so doing the Circuit Court erred. In the view we take of this case in the light of the foregoing authorities, we hold that the statements made by Cain in his application are representations and not warranties, and that if the statements were made in good faith, although some one or more of them may have been untrue, if the misstatement was not intentional, but was made in good faith and under a belief that the statement was true, the misstatement did not operate to avoid the policy.

It is sufficient if representations be substantially true. In view of what we have said there was no error in the refusal of the first instruction asked by the appellant. It is as follows:

1. The court instructs the jury on the part of the defendant that the statements made by Thomas W. Cain in his application for membership in the defendant association, as to the facts relating to his health or his habits of temperance, are warranties, and not merely representations, and if any of those

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statements were untrue, whether Cain knew them to be false or not, the contract of insurance is thereby rendered void, and if the jury believe from the evidence that the statements made in the application for membership were really false, they must find for the defendant.

It is also insisted by the counsel for the appellant that the court erred in refusing to give the fourth, fifth and sixth of the appellant's instructions. The fourth and fifth were based upon the answer to question No. 4 in the application. Each of them was predicated upon the idea of the absolute truth of these answers, treating them as warranties and not as representations.

There was no error in their refusal. The sixth instruction was as follows:

6th. "If the jury believe, in this case, that the preponderance of the evidence shows that Thomas W. Cain, during the last four years of his life, at any time immoderately indulged in the use of alcoholic stimulants of any kind, they will find for the defendant."

It is insisted by counsel for appellant that this instruction was proper under the plea which alleges that Cain falsely and fraudulently represented to the appellant that he used alcoholic or other stimulants, opium or other narcotics, only by using beer moderately; whereas, in fact, at that time and for a long period before, said Cain had used alcoholic and other stimulants immoderately and to great excess. This instruction was more comprehensive than the plea; it not only embraces the period at the time and prior to the application, but included the period subsequent thereto down to his death. This instruction was not proper under the other plea charging that he was addicted to the use of alcoholic stimulants so that he was permanently injured. It ignored the permanent injury. There was no plea under which that instruction was proper.

It is also insisted that the court erred in not allowing Dr. Potts to testify. The question was one of discretion with the trial court, and we do not think the discretion was improperly exercised. After a careful consideration of this case we are

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satisfied there was no error in the law as given by the court, or in the conclusion rendered by the jury. Substantial justice has been done.

Judgment affirmed.

CHARLES S. DOLE

V.

DAVID CLOW.

Action to Recover Damages for Overflowing Lands—Conflict of Evidence—Questions for Jury—Instructions—Pleading.

1. Where the evidence is conflicting and there is enough to support the finding, this court will not interfere with the verdict on the ground that it is against the evidence. In such a case the court will not attempt nicely to weigh the evidence on each side, and will grant a new trial only when the verdict is manifestly against the evidence.

2. The plaintiff in his declaration must clearly state the nature of the defendant's liability, and must clearly prove that liability as laid.

3. In an action to recover damages for overflowing plaintiff's land, it is *held*: That, although the evidence is conflicting, the proof sustains the declaration; that the questions involved were for the jury, and that the instructions given for the plaintiff properly submitted the controverted questions to the jury.

[Opinion filed December 11, 1886.]

APPEAL from the Circuit Court of McHenry County; the Hon. CHARLES KELLUM, Judge, presiding.

Messrs. T. D. MURPHEY and PADDOCK & ALDIS, for appellant.

The court erred in giving instructions Nos. 3 and 5 for the plaintiff in the court below.

Concerning the natural height of the lake, they are in obvious conflict with the instructions given for the defendant on that subject, and do not give the correct legal rule, and we insist must have misled the jury. By the third instruction the

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jury are told to find the defendant guilty if they found from the evidence that by the dam or slash-boards the waters of the lake were raised and elevated above their natural and usual height during the summer months of the year. By the fifth instruction the jury are told, by the court, that they should find the defendant guilty, if from the evidence they found that by his act he had maintained the waters of said lake above their natural and usual height during any summer month during the last four years. This does not naturally or necessarily refer to a raising during the summer months of the lake above its natural and usual height. Such is not the ordinary significance to be derived from language so arranged. But obviously it lays down a different rule as to the rights of the defendant from that laid down in the defendant's instructions, and hence in conflict with it. The fifth instruction so reads as to manifestly limit the height to which the defendant must confine the water to the minimum height in summer, which, as shown by the evidence, is at a low stage of water. At such stage the water did not flow out of the lake through its outlet, and off by the natural stream or water-course leading from it to Fox River. And yet, the defendant, under the law and the defendant's instructions, had the right to leave the lake up and keep it up to the very point where the lake waters would flow out through its natural outlet, and away over his soil.

We claim that the instructions complained of took from the defendant below the exercise of a natural right that belonged to him as a riparian owner; namely, of keeping his banks and consequently the lake at the height which nature fixed, and that the instructions in effect stated that if the water exceeded the level during any of the summer months, when the water was low in the lake, the defendant was liable for any damage resulting therefrom, even though the level at which he kept the lake in these months was not as high as the natural level of the lake when it flowed through its natural outlet and ran away in a well defined channel through the water-course called Crystal Lake outlet. *Plumleigh v. Dawson*, 1 Gil. 544.

The jury could not correctly decide which set of instructions was correct and which erroneous. That they were in

flat conflict with each other was obvious, and it was error to so instruct the jury, for which, if for no other reason, we respectfully insist the judgment must be reversed. Ill. Linen Co. v. Hough, 91 Ill. 63; Quinn v. Donovan, 85 Ill. 194; Morris v. Gleason, 1 Ill. App. 510; Joliet v. Walker, 7 Ill. App. 267; Ottawa, O. & F. R. R. Co. v. McMath, 4 Ill. App. 356; Sweet v. Leach, 6 Ill. App. 212; Gale v. Rector, 5 Ill. App. 481.

The defendant was a riparian proprietor, and therefore had the legal right to have the water in the lake come to his bank and flow out, as it naturally would at any and all seasons, undiminished in quality and in quantity. Angell on Water Courses, Secs. 100*a*, 101*a* and 102; Wood on Nuisances, Sec. 350; 3 Kent's Comm., 537; Plumleigh v. Dawson, 1 Gil. 544; Gould on Waters, Sec. 204; Evans v. Merriweather, 3 Scam. 494.

The defendant was under no legal obligation to lower the lake for the purpose of enabling the plaintiff to drain his land by artificial ditches. The plaintiff has no claim upon any one to lower the water in Crystal Lake by artificial means, to thereby create a receptacle for the waters proceeding from his wet marshy lands through artificial ditches. Peck v. Harrington, 109 Ill. 611; Angell on W. C., Sec. 108; Goodale v. Tuttle, 29 N. Y. 469.

Mr. M. D. BROWN, for appellee.

The owner of a servient heritage has no right by embankments or other artificial means, to stop the natural flow of the surface water from the dominant heritage and thus throw it back on the latter. Gormley v. Sanford, 52 Ill. 158; Gillham v. The Madison County R. R. Co., 49 Ill. 484; Tuttle v. Riddle, 26 Pa. 154; Williams v. Sandbeak, 47 Pa. 154; Laney v. Jasper, 39 Ill. 46; Livingston v. McDonald, 21 Iowa, 160.

The plaintiff could maintain his action if his lands were overflowed any season of the year, by a dam raising the water beyond its usual and ordinary height. Marh v. Shultz, 29 N. Y. 346; Gerrish v. New Mfg. Co., 10 Foster (N. H.), 478. These authorities apply to and clearly support the third and fourth instructions given by the appellee.

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A man has no right to erect a mill-dam on his own land so as to throw the water back to his neighbor's line in the ordinary stage of the stream, and thus cause his neighbor's land to be overflowed by the natural swelling of the stream at certain seasons of the year. *McCay v. Dunby*, 20 Pa. St. 85. This case also supports the third and fifth instructions.

WELCH, J. This was an action on the case brought by the appellee against the appellant to recover damages for injuries claimed to have been caused by the damming up by appellant of the outlet of Crystal Lake, and thereby flooding the land of appellee. The lands of appellee claimed to have been injured comprise about forty-five acres of a farm of about two hundred acres lying and bordering on the north shore of said lake. This lake is about one and three quarter miles east and west and about three fourths of a mile north and south. A portion of this farm has a lake shore front on the north of about three quarters of a mile. This forty-five acres claimed to have been injured is separated from the lake by a ridge of loose sand, gravel and pebble stones, some three feet in height. The outlet of the lake is situated at its southeast corner. The appellee had a ditch on his lands from the lake, connecting with his forty-five acres. The appellant was the owner of all the lands bordering upon and around the lake, except that owned by the appellee and a small piece of land owned by James Crow, near the northeast corner of said lake. The declaration contains two counts. The first count avers that the appellant "wrongfully stopped up, dammed up, obstructed, raised and elevated said waters of said Crystal Lake, and then and there and thereof, and by reason thereof, from thence, during all the time aforesaid, unjustly and wrongfully made and caused to be made and kept and continued, and still doth make, keep, cause and continue, large quantities of the said waters of said Crystal Lake to run and flow to, into, upon and over the said messuage, lands and premises of the said plaintiff, and thereof unlawfully, unjustly and wrongfully, by means thereof, greatly injured the plaintiff," etc. The second count avers that the appellant "doth cause,

procure and continue large quantities of water to run upon, into and over, and to flow upon and into the lands of the plaintiff." It is first insisted by the learned counsel for the appellant "that the proofs made do not agree with the case alleged, and do not support it." If this position is true, then no recovery could be sustained in this action. Under the well established rule of pleading, the plaintiff must in his declaration clearly state the nature of the defendant's liability, and that liability must be proved as laid. We have carefully examined the record in this case, and while we find a sharp conflict in the evidence, we are not prepared to say that the proof does not sustain the declaration. We do not deem it necessary to refer to the testimony in detail. The evidence for the appellee tended strongly to prove that the placing of the *flash boards* by the appellant, in 1877, at the natural outlet of said lake, had caused the waters in said lake to rise some two feet higher than it was prior thereto; that the lands claimed to have been overflowed had, prior to the placing of the flash boards, been dry and could be cultivated, and that since they were placed at the outlet the waters of said lake had flowed to, over and upon the said land of appellee, causing said land to be overflowed and rendered worthless for crops. There was also evidence for the appellee tending to prove that the placing of the flash boards by the appellant at the outlet of said lake had caused the waters in said lake to rise some two feet higher, and thereby had impeded, dammed and stopped the flow of the water from appellee's ditch into said lake, and had caused the same to flow back to, on and over the appellee's lands, thereby causing said lands to be overflowed. The evidence for the appellant tended to prove that the placing of the flash boards did not cause the waters in said lake to rise higher; that the escape of the waters from said lake had not been impeded, and that no water from said lake had flowed to, over and upon the lands of appellee, and that the escape of the water through the ditch of the appellee into the lake was not dammed, stopped or impeded by the placing of the flash boards. In this conflict of evidence the Supreme Court has uniformly held, "that the verdict will not

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be disturbed on the ground the verdict is against the evidence, where there is enough to support the finding." In such a case the court will not attempt to nicely weigh the evidence on each side, and will only grant a new trial when the verdict is manifestly against the evidence. *White v. Claves*, 32 Ill. 325; *Tolman v. Race*, 36 Ill. 472; *Umlauf v. Bassett*, 38 Ill. 96; *Harbison v. Shook*, 41 Ill. 141; *Stickle v. Otto*, 86 Ill. 161; *Addems v. Suver*, 89 Ill. 482; *Howett v. Estelle*, 92 Ill. 218. There was no question as to the placing of the flash boards by the appellant at the outlet of said lake, but whether the waters of said lake were raised thereby and caused to flow from and over the lands of appellee from said lake, or whether the water from the ditch of the appellee was impeded, dammed and stopped, and caused to flow back to, on and over appellee's lands in consequence of the placing of said flash boards, were all questions of fact. It was the province of the jury to find the facts and to determine the weight and credit to be given to the testimony. *Bishop v. Busse*, 69 Ill. 403. The objection to the 3d and 5th instructions given for appellee is not well taken. All of the controverted questions arising in the case were by these instructions clearly submitted to the jury. The fixing of the time at the summer months as to the height of the waters in said lake, prior to the placing of the flash boards, was correct. The question for the jury to determine was so stated, *supra*. We find no error in the law as given. Substantial justice has been done.

Judgment affirmed.

THE H. B. PITTS' SONS' MANUFACTURING COMPANY
V.
THE COMMERCIAL NATIONAL BANK.

Covenant not to Sue within Limited Time—Plea in Bar in Action before Expiration of Time—Demurrer—Abatement.

1. A covenant not to sue within a limited time can not be pleaded in bar to an action brought before the time has expired, although contained in a composition agreement in which the rights of third parties are involved.

2. In the case presented it is held that the plea is clearly in bar and can not be treated as a plea in abatement.

[Opinion filed December 11, 1886.]

IN ERROR to the Circuit Court of La Salle County.

Statement of the case by LACEY, J. This cause of action is based on three promissory notes of date January 2, 1883, for \$1,192.16, due December 15, 1885, with interest at six per cent., executed by the H. A. Pitts' Sons' Mfg. Co. to A. B. Meeker & Co., and by them indorsed to the appellee; and another note dated March 21, 1885, for \$654.61, due in ninety days, also executed by and to the same parties, and also indorsed to appellee; the third note was of date April 16, 1885, due in five months, executed by and to the same parties and indorsed to appellee, and was for the amount of \$466.26.

To this cause of action appellant filed a plea in bar setting up that the appellee was not the *bona fide* holder of either of the notes, but held them in trust for Meeker & Co., the payees. That on the 1st of December, 1885, appellant being in embarrassed circumstances and unable to meet its financial obligations, and the said A. B. Meeker & Co. then threatening to sue appellants on said notes, and the said appellants being at the same time indebted in large sums to other creditors then due, who were also threatening to sue, the firm of Meeker & Co., at the request of defendants, and in consideration that

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the other creditors would withhold suits against appellants, by giving further time of payment, agreed with appellants and with their other creditors to withhold suit against them, and to extend the time of payment on said notes as follows: One fourth of the amount of each of the notes till 15th December, 1886; one fourth of the amount of each until the 15th day of January, 1887; one fourth of the amount of each till the 15th day of December, 1887, and one fourth of the amount of each till the 15th day of January, 1888, and not to sue said appellants on either of said notes until default of payments on the said further days aforesaid. That the said other creditors did, in pursuance of their agreement, withhold suits according to agreement.

This suit was commenced and plea filed before either of the said installments became due in accordance with the said agreement. Appellee interposed a demurrer to the said plea which was sustained by the court, and appellants abiding by their plea, the court rendered judgment against them on the notes for \$2,571.47, from which judgment this appeal is taken, and appellants assign for error the sustaining of the demurrer and rendering of judgment as aforesaid.

Messrs. BULL, STRAWN & RUGER, for plaintiff in error.

The Supreme Court, following the tendency of modern decisions to disregard a meaningless technicality, and in the plain furtherance of justice, and with the object of avoiding useless litigation, holds that a plea setting up a covenant not to sue within a limited time may be pleaded in abatement, if not in bar.

In this case the plea may properly be considered a plea in abatement. A judgment upon it would be no bar to an action after the extension had expired. It was pleaded at the first opportunity and was verified by affidavit. It is immaterial whether the plea concludes "wherefore it prays judgment, etc.," or "wherefore it prays judgment of the said writ and that the same may be quashed." *Drake v. Drake*, 83 Ill. 526.

It presented a defense calculated to protect not only the rights of plaintiff in error, but the rights of creditors who had been lulled into security by the mutual covenant to withhold

suit, and who had kept their agreement in good faith and lost whatever advantage might have been acquired by immediate action. It was, therefore, a substantial and meritorious defense, and the court properly allowed it to be amended. *Drake v. Drake*, 83 Ill. 526.

In none of the cases is it held that an agreement between a creditor and debtor that involves the rights of other creditors, or, in other words, a composition agreement between creditors and a debtor to extend the time of payment, can not be pleaded in bar. We believe that this amended plea was a good plea in bar, to protect the rights and interests of third parties. *Perkins v. Lockwood*, 100 Mass. 249; *Farrington v. Hodgdon*, 119 Mass. 453; *Eaton v. Lincoln*, 13 Mass. 424; *Sage v. Valentine*, 23 Minn. 102; *Paddleford v. Thatcher*, 48 Vt. 574; *Fellows v. Stevens*, 24 Wend. 294; *Mellen v. Goldsmith*, 47 Wis. 573; *Pontius v. Durflinger*, 59 Ind. 27; *Renard v. Tuller*, 4 Bosw. 107; *Browne & Co. v. Stackpole*, 9 N. H. 478; *Pierson v. McCahill*, 21 Cal. 122; *Tatlock v. Smith*, 6 Bing. 339; *Austey v. Marden*, 4 B. & P. 124; *Wood v. Roberts*, 2 Starkie, 417; *Norman v. Thompson*, 4 Exch. 755; *Bradley v. Gregory*, 2 Campb. 383; *Butler v. Rhodes*, 1 Esp. 236; *Good v. Cheeseman*, 2 B. & Ad. 328; *Boyd v. Hind*, 1 H. & N. 938; *Steinman v. Magnus*, 11 East, 390; *Cockshott v. Bennett*, 2 T. R. 763; *Reay v. White*, 1 Cr. & Mees. 748; *Boothby v. Sowden*, 3 Campb. 175; *Belshaw v. Bush*, 11 C. B. 190.

Mr. D. B. Snow, for defendant in error.

Inasmuch as our own Supreme Court have recognized and adopted the rule that a covenant not to sue within a limited time can not be pleaded in bar to an action brought before the time has expired, the Circuit Court surely committed no error in following the admitted precedents. *Guard v. Whiteside*, 13 Ill. 7, and authorities therein cited; *Perkins v. Gilman*, 8 Pick. 229; *Cent. Bank v. Willard*, 17 Pick. 150; *Winans v. Huston*, 6 Wend. 471; *Thimbleby v. Baron*, 3 Mees. & W. 210.

LACEY, J. The question involved here is, can a plea in bar

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be sustained to an action in a case where the time for the payment of the debt due had been extended by a new agreement between the parties based on a valid consideration, and that time has not expired before suit brought? And was there in this case a valid consideration? The first of these propositions has been settled in the negative by our Supreme Court in a number of cases. In *Guard v. Whiteside*, 13 Ill. 7, the court says: "A covenant not to sue within a limited time can not be pleaded in bar to an action brought before the time has expired. The remedy of the party is a direct action on the covenant. The law on this subject is too well established to admit of a doubt or discussion. * * * There is a very satisfactory reason why a plea in bar of the action should not be sustained. A judgment for defendant on such a plea would forever conclude the plaintiff from bringing another action." It was intimated, however, at the close of the opinion, that perhaps such agreement might be pleaded in abatement.

In *Archibald v. Argall*, 53 Ill. 207, and *Canlan v. Johnson*, 90 Ill. 91, it was held that such matter was in abatement and not in bar. We think that these authorities are conclusive of the case here. The plea was in bar and not in abatement. The demurrer, therefore, was properly sustained for that reason. The numerous authorities cited on page 9 of the brief of the plaintiff in error, we think not in point, as those were cases of composition agreements, where either there was an agreement to take less than the full amount of the debt or to take a third party for it, and in such cases the demand would be for the new amount agreed upon or against the third party.

The case of *Drake v. Drake*, 83 Ill. 526, is cited by plaintiff in error as authority for the doctrine contended for, that the plea in question though commencing and concluding as a plea in bar may be treated as a plea in abatement. We do not understand that the rule contended for goes to that length or that the case cited supports such claim. The plea in that case was a plea properly to the jurisdiction of the court on the grounds that service was had in Cook County where the defendant resided, and not in DeKalb where the defendant did

not reside and where the suit was brought, and that the cause of action was not local. The commencement and conclusion of the plea in the case above cited was a prayer of "judgment of the writ and declaration and that the same be quashed," in form a plea in abatement, and not "whether the court ought to have further cognizance of the writ," which would be in form of a plea to the jurisdiction of the court, which latter in order to preserve technical accuracy it should have been. A demurrer to the plea was sustained by the court, which action of the court was assigned for error. The court held the assignment good, and in deciding the case said, quoting a clause in the opinion in a former case, *Humphrey v. Phelps et al.*, 57 Ill. 132: "But the right of a party to be sued in the county where he resides and to have his cause tried there is statutory and he ought not to be denied that right, a right to him in many instances of the utmost importance, by any technical and metaphysical bearing in regard to pleas in abatement." The court also decided that the plea was amendable under Sec. 23 of the Practice Act of July, 1872. But we do not understand that the court has ever gone to the length of holding that a plea clearly in bar can be treated as a plea in abatement. In fact the case of *Guard et al. v. Whiteside*, and the other cases cited, expressly negative such an idea. The fact that this was a composition agreement to extend time can, as we conceive, make no difference. It is the same as though the contract had been to extend time for some other valid consideration such as for money above the debt due or interest in advance, etc. The fact, that the consideration here, which we are inclined to hold good, was that others should also give time, could not change the rule. All that is done by this agreement is to extend time. There is no composition of the debt or displacement of the original contract as was the case in *Gillfillan v. Farrington*, 12 Ill. App. 101. If in this case, as above said, this plea is good in bar, the appellee would be forever concluded of its cause of action if the defense was made good under such plea, which would work a great hardship and be in the highest degree unjust. Perceiving no error the judgment of the court below is affirmed.

Judgment affirmed.

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BRANSON MURRAY,
V.
LIZZIE D. GIBSON ET AL.

Action to Recover Damages Caused by Digging Ditch along Highway adjoining Plaintiff's Land—Commissioners, no Power to Grant Right—Such Right can not be Granted by Parol—Parol License from Plaintiff—Condition—Ignorance of Law—Revocation—Practice—Instructions to be Abstracted—Objections, Raised too Late.

1. The right to lay a tile drain for private purposes along a highway, is one which the Commissioners of Highways have no power to grant.

2. The right to dig and maintain such a drain is such a right and interest in land as can not be given by parol but must be created by deed.

3. In the case presented, it is *held*: That the jury must be presumed to have found the issue of fact as to whether the plaintiff granted permission to dig the ditch in question, in favor of the defendants; that the jury must also have found that the condition as to obtaining the consent of the Commissioners was complied with; that such finding is not manifestly against the weight of the evidence; that the evidence sustains a finding that there was no revocation of the parol license prior to the commencement of this suit; that it is sufficient that the plaintiff gave his consent to the digging of the ditch, although he was ignorant of his legal right to forbid it; that such consent or parol license until revoked was a complete bar to all suits for trespass on account of digging and maintaining said ditch; that said license protected any who assisted in digging the ditch, and that the claims, that the ditch was not properly constructed and that it should have been tiled at once, were for the jury to determine.

4. Instructions must be abstracted as required by the rules of this court, and if objections are to be made to them they must be presented in the argument in chief. This court will not consider objections raised and argued for the first time in the reply brief of the appellant.

[Opinion filed December 11, 1886.]

IN ERROR to the Circuit Court of Livingston County; the Hon. N. J. PILLSBURY, Judge, presiding.

Mr. H. H. McDOWELL, for plaintiff in error.

A parol license to overflow the land of another is an interest in the land, and is revocable at the will of the party grant-

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ing it. Woodward v. Seely, 11 Ill. 157; Tanner v. Volentine, 75 Ill. 624; Kuhlman v. Hecht, 77 Ill. 570; Forbes v. Balenseifer, 74 Ill. 183; Washburn on Easements, 23.

Every license, therefore, that authorizes such acts as not only require to be performed upon the land, but which gives some usufruct of the land itself, is properly a grant of an incorporeal hereditament, and must be created and transferred by deed. Kamphouse v. Gaffner, 73 Ill. 454; Woodward v. Seely, 11 Ill. 157; Cook v. Stearns, 11 Mass. 535; Morse v. Copeland, 2 Gray, 302; Hatfield v. Central R. R. Co., 5 Dutcher, 571; Eggleston v. New York R. R. Co., 35 Barb. 162; Houston v. Saffer, 46 N. H. 505; Foster v. Browning, 4 R. I. 47.

The use of the highway for such a purpose is a new and additional burden upon the fee, and for such additional burden the owner of the fee is entitled to compensation. Board of Trade Telegraph Co. v. Barnett, 107 Ill. 507; I. B. & W. R. Co. v. Hartley, 67 Ill. 439.

Messrs. STRAWN & PATTON, for defendants in error.

LACEY, J. This was a suit originally commenced before a Justice of the Peace to recover for injury to appellant's land by means of a ditch dug by defendant John T. Gibson, along the east end of appellant's eighty-acre tract of land, but within the public highway. The appellant recovered before the Justice, but upon appeal to the Circuit Court was defeated, the jury finding verdict for defendant, and upon motion for new trial being overruled judgment was rendered against appellant for costs, from which judgment this appeal is taken.

The facts of the case, as far as they are undisputed, are, that appellant was the owner of the N. $\frac{1}{4}$ S. E. $\frac{1}{4}$ Sec. 19, T. 28, R. 5, E. 3d P. M., upon which tract a railroad was located east and west on the north line, and it had dug a deep ditch on the south side of the road in the right of way in order that appellant's land might be drained into it, there being a fall eastward down the railroad and northward from appellant's land to the ditch. Appellant had been engaged and had nearly completed a system of tile drains of four-inch tile on

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his land about ten rods apart, running north into the railroad ditch, the water from the tiles being carried off east along in the railroad ditch. There was also a public highway along the east end of the appellant's eighty-acre tract running north and south, of which appellant owned the land over which the road ran, subject to the easement of the road.

John T. Gibson, one of the appellees, owned a seventy-acre tract just south of appellant's eighty-acre tract, the fall to which was northward, the same as appellant's, but there was no well defined channel across appellant's land, and in fact no channel. Gibson was desirous of draining his land across that of appellant into the railroad ditch, and made application to appellant for leave to put a tile across his land. Appellant was willing, but upon terms to which the appellee John T. Gibson would not agree; but upon failure to agree he said to appellant, "I think you will hardly stop me going down the road," and appellant replied, "No; it will be between you and the Commissioners for that." Appellant testifies that what he said was: "He wanted to know if I was willing he should lay a tile drain down the highway, and I told him that that matter belonged to the Highway Commissioners to settle."

This was all the evidence on the question of this parol license. Appellee John T. Gibson dug the ditch along the highway in April, 1884, as he claims in pursuance of this permission, and for consent of the Highway Commissioners he shows a record of the Board of Highway Commissioners in June following, showing that it recognized the digging of the ditch that had been dug as proper, and made an appropriation to help pay for it. The Commissioners had never objected to the ditch being cut.

It is claimed that this ditch was improperly excavated at the mouth, being out at right angles with the railroad ditch, by reason of which by filling that ditch with a current of water shooting across it and by filling it with *debris* it caused the water to set back in the railroad ditch west past appellant's land and thereby fill and cover the mouth of his tile with water, preventing him from draining his land and causing damage; also that the ditch had been improperly constructed in other

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respects, so as to saturate and wet his land along the east end along which the drain ran. In the appellant's opening brief the grounds relied on for reversal are that the verdict of the jury was not supported by the evidence, and that the court erred in allowing in evidence the record of the Board of Commissioners of Highways above referred to, at the same time arguing the state of the law on the effect of the parol agreement, the doctrine of revocation and the right of the Highway Commissioners to grant permission to dig the drain complained of.

No objection is made to any instructions, and in fact the instructions are not even abstracted as the rules of this court require. In the reply brief for the first time, several of the appellees' instructions are objected to and elaborate argument is made to show their erroneousness. We can not consider this argument. This practice can not be tolerated. First, the instructions must be abstracted, and secondly, in fairness to the opposite party, if there is to be any objection urged to instructions it should be brought forward in the argument in chief so that appellees may have an opportunity to answer them. Any other course would be unfair to the opposite counsel as well as embarrassing to the court in its consideration of the case.

In the opening brief for the appellant he denies that any parol license was ever granted by him to John T. Gibson to dig the ditch, by either himself or the Commissioners of Highways, and avers that no such license was proven, but adds, "but granting that plaintiff did give a license to dig the ditch, at most it was only parol, and that was revocable at the pleasure of the licensor; and when plaintiff instituted suit, this license if it ever was given was then and there revoked as he had a right to do under the law."

As to the law in the case, we think it is clear that the Commissioners of Highways had no right to grant to Gibson the privilege to dig the ditch in question, "as it would be imposing an additional burthen and servitude on appellant's land," as is fully decided in *I. B. & W. R. R. Co. v. Hartley*, 67 Ill. 439, and *Board of Trade Telegraph Co. v. Barnett*, 107 Ill. 507.

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It is also clear that the right to dig and maintain such ditch is such a right and interest in the land that it would have to be created by deed and could not be given by parol. It is an easement and must be governed by the law bearing upon the conveyance of such rights. *Woodward v. Seely*, 11 Ill. 157; *Tanner v. Volentine*, 75 Ill. 624; *Kuhlman v. Hecht*, 77 Ill. 570; *Forbes v. Balenseifer*, 74 Ill. 183; *Kamphouse v. Gaffner*, 73 Ill. 454; *St. L. Stock Yards v. Wiggins Ferry Co.*, 102 Ill. 520. The doctrine in *Russell v. Hubbard*, 59 Ill. 335, is overruled or only has application in case of a party wall or some peculiar case in equity. See *Kamphouse v. Gaffner*, 73 Ill. 453, 461; *Hayes v. Moynihan*, 60 Ill. 409, is not in point. An easement was not involved in that case.

But the issue of fact as to whether appellant granted permission to dig the ditch was before the jury, and the jury may have, and we must presume, found the issue thereon in favor of appellees, and we are not prepared to say that such verdict was manifestly against the weight of the evidence. It is true it was conditional, and the jury must find that the condition was complied with by the appellee, John T. Gibson, getting the consent of the Commissioners, which it appears from the record he did, as they recognized the right to dig the ditch by paying for a portion of the expense for digging it.

The evidence shows no revocation of this parol license till the suit was commenced, at least the jury was justified in so finding by their verdict. It does not matter that the appellant did not at the time he gave his consent to the digging of the ditch, know that he had the right under the law to forbid it, nor that his ignorance of the law was the reason that he did so. It was sufficient that he gave his consent. Ignorance of the law would not excuse him or for that reason render his consent void.

And any argument urging that inasmuch as appellant did not understand the law and was not aware of his rights, he therefore could not have given his consent, would be more forcibly urged to the jury than here. We do not deem it sufficiently strong to overturn the verdict, as the jury has not seen proper to give it the weight that it is thought it deserved.

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The very fact that appellant was under the impression that he had no right to object in case the Commissioners gave their consent, may have been the controlling cause of his giving his assent.

If he gave it, as the jury by their verdict thought he did, he would be bound by it. Such consent or parol license until revoked was a complete bar to all suits for trespass on account of digging and maintaining the ditch, and such license was not revoked till the bringing the suit. Appellee could not be made a trespasser from the beginning by means of the revocation. The fact that appellee Mrs. Gibson assisted in surveying and leveling the ditch would not make her a trespasser any more than it would John T. Gibson. If he had authority at the time to dig it, he might employ others to assist him without rendering them liable as trespassers. They would be protected under his license. The claim that the ditch was not properly constructed and that it should have been tiled at once, was also submitted to the jury whose verdict we deem justified by the evidence as well on this as all other questions of fact. Seeing no error in the record the judgment of the court below is affirmed.

Judgment affirmed.

THE ALABAMA INSURANCE COMPANY

V.

KINGMAN & COMPANY.

Equity Jurisdiction to Enjoin Judgments at Law—Judgment by Default on Insurance Policy—Service on "Late Agent"—Sufficiency of—Fraud.

1. As a general rule a court of equity will not take jurisdiction to enjoin judgments at law where there is an adequate remedy at law. It will not review a judgment at law as a court of errors.

2. The practice of resorting to courts of equity to enjoin judgments at law should not be encouraged.

3. Upon a bill to enjoin a judgment by default on a policy of insurance, on the grounds that service on a "late agent" of the complainant company

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was insufficient and that said policy had been fraudulently altered, it is *held*: That the remedy at law by writ of error is complete, and that if the judgment was obtained without jurisdiction, it is void even in a collateral proceeding.

[Opinion filed December 11, 1886.]

IN ERROR to the Circuit Court of Peoria County; the Hon. JOHN J. GLENN, Judge, presiding.

Messrs. CRATTY BROS., FULLER & GALLUP, for plaintiff in error.

Messrs. FOSTER & KELLOGG, for defendant in error.

LACEY, J. Bill in equity by the plaintiff in error against defendant in error, brought in the Circuit Court, showing that in 1884 plaintiff in error issued a policy of insurance to defendants in error upon merchandise stored in East St. Louis. That after the delivery of the policy it was fraudulently altered by defendants in error, without the knowledge of plaintiff in error, by changing the limit of other insurance to be permitted, from \$15,000 to \$25,000. Plaintiff was not aware of it till 1885. That at the time the merchandise was destroyed by fire, the defendant in error had other insurance on the merchandise to the amount of \$20,000, in violation of the terms of the policy as issued and in fraud of plaintiff in error's rights, and that the policy was void, and some other grounds, but this was the main one.

That on November 17, 1884, defendant in error began a suit in assumpsit in the Circuit Court of Peoria County, based on said insurance policy, and on January 5, 1885, obtained judgment by default for \$2,334.43 and costs of suit against plaintiff in error, claiming the property insured had been destroyed by fire, June 29, 1884. That plaintiff in error knew nothing of this till long afterward. The bill further avers that plaintiff in error was not in court by proper service or otherwise; that said judgment was rendered without jurisdiction and was void. The only pretended service there was in

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the case was by service of summons on Charles F. Bacon of Peoria, Illinois, and Mrs. M. R. Smith of Chicago, Illinois. The return on the summons made by the Sheriff of Peoria County was that the Sheriff had served it on him by delivering a true copy of the writ to him designating him as the "late agent" of the plaintiff in error and that no president, clerk, secretary or director or other agent of the plaintiff in error was found in the said county. Done on 10th November, 1884.

A similar return was made on the summons suit to the Sheriff of Cook County by the Sheriff of that county on Mrs. M. R. Smith dated 19th November, 1884. That these were the only processes served.

The bill avers that at the time of the said pretended service on said Bacon and said Smith, neither of them was agent of plaintiff in error for the transaction of business in the State of Illinois; nor was either of them at any time the attorney or agent of complainant for the transaction of its business, or for the purpose of securing service of process on complainant in said estate; that neither of them gave any notice to plaintiff in error of the pendency of said suit—claims the service not binding on plaintiff in error and asks that the judgment be set aside and it allowed to plead to the merits of the suit; prays for a writ of injunction against the Sheriffs of Peoria and Cook Counties restraining each of them from collecting any *feri facias* issued on said judgment.

An amendment was made to the bill that Mrs. Smith had been garnisheed, and she admitted that there was in her hands money to the amount of \$548.68 belonging to plaintiff in error, and judgment was rendered and execution issued against her; and that a transcript of the record had been taken and sent to Mobile, Alabama, and suit brought on it at that place in the United States Court where the case was being pressed for trial; offers to submit to the jurisdiction of the Peoria Circuit Court and pay any judgment that might be rendered against it so far as able; avers it has property in this State subject to execution.

To this bill a general demurrer was filed, and upon hearing

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the court sustained the demurrer for the want of equity on the face of the bill and rendered decree against the plaintiff in error, and from this decree this writ is brought to this court.

The main point urged in this case for reversal is that in the suit in assumpsit on the said insurance policy by the defendant in error, there was an entire failure to get legal services of process on plaintiff in error, and that such fact appears on the face of the record, the two Sheriff's returns not showing a valid legal service.

The particular defect pointed out in such return is, that neither of the returns make a statement that the person to whom the true copy of the writ was given was the agent of the plaintiff in error, but was the "late agent." It is urged that this is not a compliance with Sec. 4 of the Practice Act in this State. The cases of *Ill. & Miss. Tel. Co. v. Kennedy*, 24 Ill. 319, and *Mich. State Ins. Co. v. Abens*, 3 Ill. App. 499, are conclusive authority on this point of their contention.

On the other hand the defendant in error combats this claim and insists that, as the bill does not show that the plaintiff had not complied with the law of this State in reference to foreign insurance companies doing business in this State, it must be presumed that it had done so. In that case the defendant in error, also a corporation, contends that the service of process is good under Sec. 22, Chap. 73, Laws 1869, because such service may be had on the agent after the insurance company ceases to do business in the State; and that service on the "late agent" is good. It is also insisted by defendant in error that the plaintiff in error, in case the service is void as alleged, has a complete remedy at law by writ of error direct to the Appellate Court, and that therefore a bill in equity will not be entertained. Without stopping to pass on the sufficiency of the service of the summons we are inclined to hold that the point is well taken. If the service is void the remedy is complete by writ of error, and if it is valid there is no pretense that the plaintiff in error has any grounds for relief; for if it was properly in court, its negligence in not making defense in the assumpsit suit would bar this action. It is generally held

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that in cases of fraud, accident and mistake, equity will take jurisdiction to enjoin a judgment at law even if the defendant may have a remedy at law. It is the fraud that gives the jurisdiction. Fraud, accident and mistake are original heads of equity jurisdiction. But the instances of resorting to a court of equity to enjoin judgments at law are not frequent, and the practice ought not to be encouraged. *Foot v. Despain*, 87 Ill. 28. See also *Owens v. Ranstead*, 22 Ill. 160. For other cases bearing remotely on the question, see *Hoagland v. Creek*, 81 Ill. 506; *Blackburn v. Bell*, 91 Ill. 434. We think it may be safely said that it is a general rule that courts of equity will not take jurisdiction to enjoin judgments where there is an adequate remedy at law.

In this case we find no cause for exception to the general rule. It is nothing more than to ask a court of equity to review the judgment at law as a court of errors, and such practice is never allowed. Again, if this judgment is void, as insisted, it should not need any reversal; for a judgment obtained without jurisdiction of the person is void, even in a collateral proceeding.

Seeing no error in the action of the Circuit Court in sustaining the demurrer and dismissing the bill, the decree of the court below is affirmed.

Decree affirmed.

JEREMIAH S. MOYER ET AL.

V.

CAROLINE SWYGART.

Jurisdiction—When a Freehold is Involved—Bill to Contest Will Devising Real Estate.

1. Where the primary object of the suit is the recovery of a freehold estate, the title whereof is directly put in issue, and where the suit, if prosecuted to a final determination, will, by virtue of the judgment or decree ren-

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dered therein as between the parties, result in one gaining and the other losing the estate, a freehold is involved.

2. Upon a bill to contest the validity of a will which devised all of a tract of land to the defendant, it is held that this court is without jurisdiction, the question at issue being, whether the defendant shall have a freehold interest in all the land or only an aliquot part as an heir of the testator.

[Opinion filed December 11, 1886.]

APPEAL from the Circuit Court of Lee County.

Mr. SHERWOOD DIXON, for appellants.

Messrs. W. & W. D. BARGE, for appellee.

Per Curiam. This was a bill in equity filed by appellee to contest the validity of the proposed will of John Moyer, deceased, which had been admitted to probate on the 9th April, A. D. 1884, and letters testamentary granted to John D. Crabtree.

It is alleged in the bill that in and by the said will the testator bequeathed portions of his estate, real and personal, to, as follows: To said Jeremiah S. Moyer, one of the appellants, the S. E. $\frac{1}{4}$ of section 18, T. 22 N., range 9, east of the 3d P. M., in said Lee County, to have and to hold to him, his heirs and assigns forever, and also a certain horse, called "Prince," and carriage and carriage harness. That at the time of the pretended execution of the said pretended will the said John Moyer, the testator, was not of sound mind and memory, but on the contrary was in his dotage and his mind and memory so impaired as to render him wholly incapable of making any distribution of his estate. That the said Jeremiah S. Moyer used and exercised many undue arts and fraudulent practices, and resorted to falsehood and misrepresentations to induce the said John Moyer to execute said paper, and if he did execute the same he was under improper restraint and undue influence from said arts and fraudulent practices.

The bill makes said Jeremiah S. Moyer, John E. Moyer, Eva Kline and John D. Crabtree respondents, and prays that said will and probate be set aside. The executor and John S.

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Moyer filed answers denying the incapacity of the said testator and that he was under undue influence as charged in the bill. The other respondents also filed answers putting in issue the charge of incapacity and undue influence. This issue of fact was submitted to the jury, and their verdict was that the writing in evidence was not the will of the said John Moyer, deceased. Motion by appellants for a new trial which was overruled, and decree setting aside the will and awarding costs against appellants, was passed by the court. From such decree the appellants appealed to this court.

The appellee, by her attorneys, moves this court to dismiss the appeal in this case for the reason that a freehold is involved and the court has no jurisdiction to pass upon the issues involved herein. The decision of this motion was by the court reserved to the hearing. We find no case decided by the Supreme Court exactly in point with the case at bar, but we think the principle has been decided by that court. The rule announced in *C., B. & Q. R. R. v. Watson*, 105 Ill. 217, we think is broad enough to cover this case. It is there laid down as a rule that "where the primary object of the suit is the recovery of a freehold estate the title whereof is directly put in issue, and where the suit, if prosecuted to a final determination, will, by virtue of the judgment or decree rendered therein, as between the parties, result in one gaining and the other losing the estate, a freehold is involved."

In *Gage v. Scales*, 100 Ill. 218, it was held, in a case where the original owner of real estate filed a bill to set aside as a cloud on his title, a tax deed held by another, on the grounds that the real estate had been redeemed from the sale upon which the tax deed was based, that a freehold was involved. The court say, that "if a redemption was made, that defeats the appellant's title; if, on the other hand, no redemption was effected, then the title of the property passed under the deed. It seems plain that within the meaning of the statute a freehold is involved."

In the *Chicago Theological Seminary v. Gage*, 103 Ill. 175, the same rule is announced and the doctrine adhered to, though opposed to the views of Judge Mulkey, the writer of

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the opinion, he adhering to the rule on the ground of judicial precedent. The decision in the case at bar settles the question of the validity of the proposed will of John Moyer, deceased, and in consequence the claimed ownership of a freehold interest of Jeremiah S. Moyer in the quarter section of land bequeathed to him by the will. It settles the question beyond any power on his part to avoid it, whether he shall have a freehold interest in all the land described or only an aliquot part as heir of John Moyer, deceased. We know it has been the practice to dismiss suits of precisely the character of this, by some other of the Appellate Courts, for the want of jurisdiction, and the case afterward taken to the Supreme Court on error and jurisdiction by that court retained, though probably the point of jurisdiction was not raised before it. We cite *Freeman v. Easley*, 117 Ill. 317, which was appealed directly to the Supreme Court from the Circuit Court and was a case of contest of will by bill in chancery. We are of opinion that a freehold estate is involved; therefore the motion to dismiss the appeal for want of jurisdiction is sustained, and leave is given to appellant to withdraw the record.

Appeal dismissed.

DAVID G. MITCHELL

V.

CHARLES P. WILLARD & COMPANY.

Action to Recover for Machinery Sold—Evidence—Erroneous Instructions.

In an action to recover the price of a boiler, engine and inspirator attachment, it is *held*: That it was error to admit in evidence the shipping bills of the carrier to show the condition of the machinery when shipped; that certain instructions were erroneous, there being no evidence upon which to base them; that an instruction assuming that the defendant kept men in his employ an unreasonable length of time was erroneous, the fact assumed being for the jury; and that an instruction touching the leakage of the boiler was erroneous in view of the evidence.

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[Opinion filed December 11, 1886.]

IN ERROR to the Circuit Court of Winnebago County; the
HON. WILLIAM BROWN, Judge, presiding.

Mr. J. C. GARVER, for plaintiff in error.

Mr. M. BRAZEE, for defendant in error.

BAKER, P. J. This was assumpsit prosecuted by Chas. P. Willard & Company, defendants in error, against David G. Mitchell, plaintiff in error, to recover the price of a boiler, engine and inspirator attachment. The general issue was filed and with it notice of special matter of defense, to the effect that the boiler and engine were warranted to be first class in every respect; that there was a breach of this warranty and consequent damage, and that the boiler and engine were worth less than the contract price; and further that by the terms of the agreement they were to have been delivered in ten days from the date of the contract, February 4, 1883, and were not delivered before March 16, 1883, whereby, it was claimed, the plaintiff in error was damnified as stated in the notice.

There was a jury trial, and a verdict and judgment in favor of defendants in error for almost the full amount of their claim.

The evidence is conflicting; and it is not necessary to discuss it.

Several errors were committed during the progress of the trial that require a reversal of the judgment. It was error to admit in evidence, over the objections of plaintiff in error, the shipping bills of the engine and boiler given by the Chicago and Northwestern Railway Company for the purpose of showing the machinery was in good order and condition when shipped at Chicago. The statements in these bills of lading were the statements of the agents of the railway company, and not the statements of plaintiff in error, or of any one authorized to speak for him. These statements might have been proper testimony if the litigation had been against such com-

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pany ; but they were not competent evidence against plaintiff in error.

The first, third and fourth instructions for defendants in error were erroneous. There was no evidence before the jury tending to show that any injury was done or occasioned to either the boiler or engine while in course of transportation or after their shipment from Chicago, or arrival at Rockford. As disclosed by the testimony, the contention of plaintiff in error was, that the boiler and engine were not properly made and constructed, and were not first class articles; and the contention of defendants in error was, that they were properly made and constructed, and first class in every respect. The instructions under consideration told the jury that defendants in error were not responsible for imperfections or injuries caused or occasioned by transportation from Chicago to Rockford, or in unloading the boiler and engine, or in placing them in the place of business of the plaintiff in error. There was no evidence to base these three instructions of the court upon, and they called the attention of the jury from the real to a fictitious issue, and intimated to them a defense not suggested by the proofs. See *Grim v. Murphy*, 110 Ill. 271. The effect of those instructions was all the more injurious when taken and considered in connection with the admission in evidence of the shipping bills, and the reference in one or more of the instructions to the statements made in these bills that the articles shipped were in "good order."

The sixth instruction was also objectionable. It assumed that the plaintiff in error hired and retained men in his employ for an unnecessary and unreasonable length of time. The question whether or not such was the fact should have been left to the jury to determine.

The seventh instruction was as follows:

"Although the jury believe from the evidence that the boiler in question when it was first heated up, sweat and leaked some water and steam to some extent, still if the jury believe from the evidence that boilers of first class quality and make usually leak steam and water when first heated up, and they afterward become tight and proper for use, you are instructed

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that the said fact of sweating and leaking is not sufficient of itself to show that the boiler in question was not a first class boiler for the purposes for which it was intended and purchased."

The evidence of the plaintiff in error tended to prove not only that the boiler leaked very badly when it was first put up and for a considerable length of time, and that he expended money in making repairs and curing defects, and was thereby delayed in his business, but also that it had always leaked since it was first put in place, and continued to leak down to the time of the trial, a period of more than two years. The evidence of defendants in error tended to prove that boilers, even first class quality and make, most usually leak, to some extent, at first firing, and for a few days. In the light of the evidence it would seem this seventh instruction was inaccurate, erroneous and calculated to mislead. This boiler may have leaked much more than first class boilers ever leak, and the leaking instead of being a mere temporary matter of a few days, may have continued for years; and yet the jury would understand, from the instructions, that they would not regard such fact of leaking as sufficient to show that the boiler was not a first class boiler.

The judgment is reversed and the cause remanded.

Reversed and remanded.

HENRY HELLMAN

V.

AUGUST SCHIFFER AND LORENZ REITZ, SHERIFF.

Judgment and Attachment Liens—Priority—Judgments at Same Term—Right to pro rata under Secs. 1 and 13, Ch. 77, R. S.—Amount Due—Judicial Sales—Caveat Emptor.

1. Under Secs. 1 and 13, Ch. 77, R. S., property on which an execution has been levied must be sold for the benefit of all executions issued upon judgments rendered at the same term, and the proceeds of such sale must be divided upon the several executions *pro rata*.

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2. In the case presented, it is *held*: That the order to *pro rate* was properly based upon the balance due on appellant's judgment when the real estate was sold, after deducting the amount realized on said judgment by a previous sale of personal property; that the court properly refused to allow proof that part of the property so sold as personalty has since been taken as realty, the rule *caveat emptor* being applicable; and that certain intervening attachment liens did not cut off the last judgment from the right to *pro rate* with that of appellant.

[Opinion filed December 11, 1886.]

APPEAL from the Circuit Court of Will County; the Hon. CHARLES BLANCHARD, Judge, presiding.

Statement of the case by WELCH, J. On May 25th at the regular May term of the Will County Circuit Court, Henry Hellman recovered a judgment against August Schiffer for the sum of \$7,203. At the September term of said court, Hellman filed his sworn petition and asked for a rule on the Sheriff to issue to him a certificate of purchase to a certain tract of 26.32 acres of land purchased by him under a sale made by the Sheriff under his execution, issued on said judgment. The land was purchased at the sum of \$1,965, which sum he requested the Sheriff to apply on his judgment and execution, which the Sheriff refused to do, on the ground that other liens were claimed on the real estate sold and its proceeds. The reply of the Sheriff to the petition of appellant states: "The following is a statement of executions now in my possession, also amount realized by sale of personal property and real estate belonging to the defendant, August Schiffer:

Henry Hellman v. August Schiffer, damages	\$7,203 00
Satisfied by sale of personal property	5,117 46
	<hr/>
Balance due	\$2,085 54
Herman Badenhoop v. August Schiffer, damages	\$1,458 52
Otto Butz " " " "	2,285 00

The said Butz execution returned by plaintiff's order unsatisfied."

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The attachment writs on which levy was made and certificates filed in Recorder's office, are :

Sophia Keursten v. August Schiffer, claims	\$1,439 84
Gray, Burt and Kingman v. August Schiffer, claims	294 42
Henry Brown v. August Schiffer, claims	1,206 66
Total on attachment	\$2,940 92
Amount realized from sale of real estate on September 16, 1885. Paid by Henry Conrad	\$ 151 00
Bid by Henry Hellman	1,965 00
Total	\$2,116 00

The said Henry Hellman claims that the amount of his bid shall be credited to him on his execution, and the said Badenhoop claims a *pro rata* share of the proceeds and I desire the advice and order of the court in the premises.

Order of court finds :

That on May 25, 1885, at the May term of the Will County Circuit Court, petitioner, Henry Hellman, recovered a judgment against August Schiffer for \$7,203 and costs. That execution was issued thereon and delivered to the Sheriff on May 25, 1885, and said petitioner realized by sale of personal property, \$5,117.46. That by virtue of said execution said Sheriff sold in due form of law, on September 16, 1885, to plaintiff, in execution, for the sum of \$1,965, the real estate described as follows :

26.32 acres (giving full description), all in Will County, Illinois. And to one Henry Conrad for \$151, certain other real estate, which sum of \$151 is now in Sheriff's hands. That at divers times, to wit: On May 30, 1885; on June 3, 1885; on June 4, 1885, and on June 5, 1885, certificates of levy against said August Schiffer and upon the real estate thus sold, were filed by said Sheriff and recorded in the Recorder's office of Will County. That on June 10, 1885, suit was commenced and process issued out of the Will County Circuit Court against said August Schiffer for claims against him as school treasurer of the town of Monee in said Will County. That on June 15, 1885, Herman Badenhoop recovered a judgment against August Schiffer for \$1,458.52 and

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costs. That an execution was issued thereon and delivered to the Sheriff on June 15, 1885. Therefore, the court finds that the said Herman Badenhop is entitled to a *pro rata* share with the said Henry Hellman upon the money made upon the sale of said real estate. That the amount due said Henry Hellman at the time of the sale of real estate is \$2,085.54; and the amount due Herman Badenhop is \$1,458.52; and that the amount for distribution after payment of costs is \$2,075.41. That the *pro rata* share of Hellman is \$1,221.43, and of Badenhop is \$853.98.

It is therefore ordered that upon said Hellman paying to the Sheriff the sum of \$853.98 to be applied on said Badenhop execution, that said Sheriff deliver to said Hellman a certificate of purchase in pursuance of the sale to him in due form of law.

Petitioner excepts and prays an appeal, which was granted.

Various errors are assigned. The principal errors are: The court erred in not finding that appellant had a prior lien on the real estate sold. The court erred in refusing to direct that the whole proceeds of the real estate should be applied upon his judgment and the execution thereon, upon which the sale was made. The *pro rata* order of distribution made by the court, is contrary to law. That no portion of the proceeds should have been applied on Herman Badenhop's judgment.

Mr. A. O. MARSHALL, for appellant.

Messrs. JOHN T. DONAHOE and HALEY & O'DONNELL, for appellees.

Messrs. R. E. BARBER and J. B. FITHIAN, for attachment creditors.

WELCH J. The question presented for consideration in this case has not, as far as we have been able to ascertain, been directly presented or passed upon by the Supreme Court. It involves the proper construction and legal effect of Secs. 1 and 13 of Chap. 77, Revised Statutes. Sec. 1 provides: "That

a judgment of a court of record shall be a lien on the real estate of the person against whom it is obtained, situated within the county for which the court is held, from the time the same is rendered or revised, for the period of seven years, and no longer. Provided, that there shall be no priority of the lien of one judgment over that of another, rendered at the same term of court or on the same day in vacation." And Sec. 13 of Chap. 77, *supra*: "When the lien of several judgments is concurrent, by reason of the same having been rendered at the same term of court, or on the same day in vacation, and execution issued upon any one of such judgments is levied upon property subject to such lien, the property so levied upon shall be sold for the benefit of all executions issued upon such judgments, and delivered to the same officer or any of his deputies before sale. And the proceeds of such sale shall be divided upon the several executions *pro rata*, according to their several amounts."

These two sections are in perfect harmony with each other. Although it is stated in the body of Sec. 1 that the *lien* is from the date the judgment is rendered, the right to the exclusive benefit of this *lien* is qualified by the proviso: "That there shall be no priority of the lien of one judgment over that of another rendered at the same term of court." The proviso qualifies the body of the section. *Boon v. Juliet*, 1 Scam. 258.

There is no question made that the facts as found by the court are not sustained by the proof. The objection is based on a claimed error in the application of the law to the facts.

The court finds: That on May 25, 1885, appellant recovered his judgment against August Schiffer for \$7,203 and costs, and caused execution to issue thereon, and placed same in the hands of the Sheriff on same day, and that he had realized by sale of personal property, \$5,117.46. That by virtue of said execution said Sheriff sold in due form of law, on September 16, 1885, to plaintiff in execution, for the sum of \$1,965, certain real estate. And to Henry Conrad for \$151 certain other real estate, which sum of \$151 was in Sheriff's hands. That at the same term, to-wit, June 15, 1885, Herman Badenhoop recov-

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ered a judgment against August Schiffer for the sum of \$1,458.52 and costs. That an execution was issued thereon and delivered to the Sheriff on the 15th day of June, 1885. Applying the law, *supra*, to the facts of the case, Badenhoop recovered his judgment at the same term, caused his execution to issue thereon and placed it in the hands of the Sheriff. The execution of Hellman being levied upon the real estate, "The property so levied upon must be sold for the benefit of all executions issued upon the judgments rendered at the same term, and the proceeds of such sale shall be divided upon the several executions *pro rata* according to their amounts." *Ita lex scripta est*. It is, however, insisted that the order to *pro rate* should have been based upon the amount of appellant's judgment, and that no deduction should have been made for amount realized on personal property.

The time when a lien commences on personal property, as declared in Sec. 9, Chapter 77, *supra*, "No execution shall bind the goods and chattels of the person against whom it is issued, until it is delivered to the Sheriff, or other proper officer, to be executed." Sec. 51, Chapter *supra*, provides if the goods and chattels sold on execution have been attached or seized on execution by another creditor, the proceeds of the sale shall be applied to the discharge of the judgments in the order in which the respective writs of attachment or executions became a lien, or are by law entitled to share. Badenhoop, by virtue of his execution, acquired no lien to share in the proceeds of the sale of the personal property in this case, as it did not amount to a sum sufficient to pay off the prior lien of appellant. Appellant having sold the personal property, and by such sale having received the full benefit of his execution lien thereon, can not now complain that he should be required to *pro rate* with Badenhoop, in accordance with the amount due him, at the time of such sale of the real estate. Could it be claimed that he had the right to sell real estate for the full amount of his judgment, and thus cut off the liens of the attaching creditors? Manifestly not. Or could it be claimed that he had the right even to sell for the balance due and claim a *pro rata* on the whole amount of his judgment?

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His lien upon the real estate created by his judgment had been extinguished to the extent of the amount realized from the sale of the personal property.

And his lien at the time of the sale was for the balance due at that time on the judgment, and as to that balance, Badenhoop was entitled to his *pro rata* share.

It is also insisted by counsel for appellant that the court erred in not allowing him to prove that the amount of \$1,400 charged to him as the avails of personal property was for a bid made by him for a grain warehouse building struck off as personal property, and that the building had been taken from his possession as real estate covered by prior liens. Our answer to this objection is that this was a judicial sale, and that the rule *caveat emptor* applies to all such sales. *England v. Clark*, 4 Scam. 486; *Misner v. Eronger*, 4 Gilm. 69.

It is further insisted by counsel for appellant that under the law the intervening liens cut Badenhoop off from sharing in the sales of the real estate made on Hellman's execution, and that the court should have ordered the entire amount applied to his execution. The lien of Hellman was prior to that of the intervening liens. Their liens were subordinate to his. Under Secs. 1 and 13, Chap. 77, *supra*, he had no priority over Badenhoop to the extent of his lien. We are of the opinion that the order made in this case is in perfect harmony with the law. And if, as claimed by counsel in this case, it works great hardship and injustice to the appellant, such arguments would be proper and right to the law-making power in this State. Our duty is to administer the law as we find it.

If the law is oppressive or unjust in any of its provisions, a strict enforcement thereof will the more speedily result in its change. The order made by the Circuit Court in this case is affirmed.

Order affirmed.

Jones v. Lander et al.

JULIAN P. JONES, ADMINISTRATOR, ETC.,
V.
FRANKLIN C. LANDER ET AL.

Limitation Act of 1872—Sec. 11, Prospective in Its Operation—Trust Deeds and Mortgages, within Statute.

1. Sec. 11 of the Limitation Act of 1872, being prospective only in its operation, does not apply to a trust deed executed and delivered prior to July 1, 1872, when that act took effect.

2. It is the settled law of this State that mortgages and trust deeds are within the Statute of Limitations, and are barred thereby at the same time as the debts which they secure.

[Opinion filed December 11, 1886.]

APPEAL from the Circuit Court of Winnebago county;
the Hon. CHARLES V. EUSTACE, Judge, presiding.

Mr. GEORGE M. BLAKE, for appellant.

This note and trust deed were dated, made and delivered prior to the passage and taking effect of the Limitation Act of 1872, and so are not within its scope and purview.

Courts will not give a statute of limitations a retrospective operation if they can possibly avoid it. *Betts v. Bond, Breese*, 287; *People v. Thatcher*, 95 Ill. 109; *Conway v. Cable*, 37 Ill. 82; *Knight v. Begole*, 56 Ill. 122; *Hatcher v. T., W. & W. R. R. Co.*, 62 Ill. 477; *McHaney v. Trustees of Schools*, 68 Ill. 140.

Mr. A. H. FROST, for appellees.

If there had been a statute of limitations as to trust deeds in force at the time of the enactment of the law of 1872, any rights that had accrued would have been saved by Sec. 24, and would not have come under the operation of Sec. 11. The saving clause (Sec. 24) does not apply to any cause of action, accrued or not, that was not affected by the repeal of any limitation law under the enactment of 1872. *Gridley v. Barnes*, 103 Ill. 211.

There was no statute of limitations prior to the passage of the act of 1872, directly affecting trust deeds. Sec. 11 is a new section, not the revision of an old one, and the saving clause of the statute applies to accrued causes of action that would have been affected by some revised section of the limitation law but for the saving clause, and does not apply to such sections of the act as create new rules of limitation. *Gridley v. Barnes*, 103 Ill. 211.

No right, liability or cause of action within the intendment of Sec. 24 had arisen or accrued in this case at the time of the passage of the Act of 1872, so that this case is excepted from the provisions of Sec. 24. The case of *Means v. Harrison*, 114 Ill. 248, refers solely to promissory notes, and does not relate to trust deeds and mortgages.

BAKER, P. J. On the 3d day of July, 1871, John F. Lander, now deceased, made to the Rockford Insurance Company his promissory note for \$5,000, due in five years from that date, bearing ten per cent. interest, payable semi-annually and containing a clause to the effect that if the interest was not paid for thirty days after due, then the note was to be due and payable. To secure this note he executed a trust deed of the same date on real estate, to one R. P. Lane as trustee, and this trust deed contained a provision that if default was made in the payment of the said moneys or interest at or before the time specified for such payment, then and in such case the trustee was authorized to sell and close up the trust. The first and second semi-annual installments of interest were promptly paid, but the third installment, due January 3, 1873, was not paid until the 13th day of March, 1873. Thereafter the interest was paid more or less promptly, to January 3, 1883.

In 1872 the note and trust deed were sold, transferred and resigned for a valuable consideration, to the estate of one Robert M. Brantingham, deceased. In 1874 John F. Lander died, leaving his only son and child, Franklin C. Lander, one of the appellees herein, as his residuary legatee and devisee; by virtue whereof said Franklin C. Lander became and was

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possessed of the mortgaged premises, or of the equity of redemption therein.

On the 28th day of September, 1885, the appellant, Julian P. Jones, as administrator *de bonis non cum testamento annexo* of the estate of Robert M. Brantingham, deceased, filed this bill in the Winnebago Circuit Court for the purpose of foreclosing the above mentioned trust deed, and from the bill the foregoing facts appear. The court sustained a demurrer to the bill, and dismissed it for want of equity at the cost of appellant.

The action of the Circuit Court was based upon the theory that by the failure of the maker of the note and trust deed to pay the installment of interest that fell due on the third of January, 1873, until more than thirty days after it was due, a right to foreclose or make sale, accrued, and that as the bill was not filed until after the expiration of more than ten years from the termination of such thirty days, the right to foreclose was barred by Sec. 11 of the Limitation Act of April 4, 1872, which provides that "no person shall commence an action or make a sale to foreclose any mortgage or deed of trust in the nature of a mortgage, unless within ten years after the right of action or right to make such sale accrues."

The ruling of the court in sustaining the demurrer and rendering a decree dismissing the bill was erroneous. •

In *Means v. Harrison*, 114 Ill. 248, it was held that the Limitation Act of 1872 had no application to a promissory note given in January, 1872, and due two years after the date thereof, but that such note was governed by the sixteen years limitation established by the act of the 5th of November, 1849, which was in force when the note was executed.

In *McMillan v. McCormick*, 117 Ill. 79, it was held that under the Limitation Law of 1849, and under the Statute of Limitation in force prior thereto, it was the settled law of this State that mortgages and trust deeds were within the Statute of Limitations and barred thereby; that the debt was the principal thing and the mortgage or deed of trust a mere incident to the debt; that when the principal thing was named in the statute, that which was incident to it was covered by the statute

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by necessary implication, although not expressed therein ; and that hence, when the debt was barred in sixteen years by the law of 1849, it was vacant and the mortgage or trust deed securing it was also, by the same words, barred in that time. And the conclusion was reached that Sec. 11 of the Limitation Act of 1872 was prospective only in its operation, and did not apply to mortgages or deeds of trust executed and delivered prior to July 1, 1872, the date that act went in force. The case of McMillan v. McCormick is exactly in point, and decisive of the matter now under consideration. It is wholly unnecessary to repeat the course of reasoning by which the conclusions in Means v. Harrison and McMillan v. McCormick were reached ; suffice it to say that in the latter case it was expressly held that the matter of the construction to be given Sec. 11 of the Statute of 1872 was not governed by Hyman v. Bayne, 83 Ill. 256, and Gridley v. Barnes, 103 Ill. 216, as the principle involved was not analogous to that involved in those cases.

It follows from what we have said that the decree of the Circuit Court must be reversed and the cause remanded, with instructions to that court to overrule the demurrer to the bill of complaint of appellant.

Reversed and remanded.

GEORGE W. McMAHILL

v.

MARTIN HUMES.

Chattel Mortgages—Sale to Mortgagee—Validity of—Change of Possession—Sufficiency of—Loan—Practice—Trial without Jury—Finding of Court—How far Conclusive.

1. After verbal sale and delivery of chattel property or after *bona fide* delivery of mortgaged chattels to the mortgagee in satisfaction of the debt, the vendee or mortgagee may temporarily loan the same to the vendor or mortgagor or employ the latter to use the chattels in the service of the vendee without invalidating his title.

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2. Where the mortgagor merely hitches horses to the mortgagee's rack for a half hour and then borrows them, the possession of the mortgagee is not long enough to apprise all parties of the change of ownership.

3. Where a jury is waived, the finding of the court, like the verdict of the jury, is conclusive, unless it is manifestly against the weight of evidence.

[Opinion filed December 11, 1886.]

APPEAL from the Circuit Court of Warren County; the Hon. A. A. SMITH, Judge, presiding.

In connection with this case see the following case of *Eagle v. Rohrheimer*.

MESSRS. STEWART & STEWART, for appellant.

There is no evidence whatever that McMahonill intended to defraud any of Willard's creditors, and having bought and paid for the horses, McMahonill had a right to loan them to Willard to finish gathering his rent corn, and by so doing he did not defraud Humes, or induce him to part with any of his property, because Humes testifies that he took his mortgage to secure a store bill, and a note he bought of Ostrander, and that he had no intention of taking the chattel mortgage when he bought the note of Ostrander. *Brown v. Riley*, 22 Ill. 46; *Wright v. Grover*, 27 Ill. 426; *Neece v. Haley*, 23 Ill. 416; *Funk v. Staats*, 24 Ill. 632, 645; *Cunningham v. Hamilton*, 25 Ill. 228; *Reynolds v. Patterson*, 4 Ill. App. 183.

The fact that McMahonill loaned the horses to Willard after he had bought them is not a fraud *per se*, as was urged in the Circuit Court. *Cunningham v. Hamilton*, 25 Ill. 231; *Reynolds v. Patterson*, 4 Ill. App. 183.

MESSRS. GRIER & DRYDEN, for appellee.

Reed v. Eames, 19 Ill. 594, announces a principle which has never been departed from since: that where a mortgage, like the one in the case at bar, contains a stipulation that the property shall remain with the mortgagor until default, that becomes the agreement between the parties placed upon record, thereby giving notice to all of the kind of tenure by which

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the possession is held; that upon default by maturity or otherwise, the title and right of possession become absolute in the mortgagee and he is bound to take possession, and that a failure to do so upon default is a fraud, because the real ownership being in one person and the ostensible ownership in another, gives the latter a false credit. And Justice Breese adds that while some courts hold such facts open to explanation, the safer and better rule is that it constitutes fraud *per se* and incapable of explanation; conclusive as against creditors, subsequent purchasers, etc.

This doctrine has been affirmed and re-affirmed, notably in *Thompson v. Yeck*, 31 Ill. 73; *Cass v. Perkins*, 23 Ill. 382; *Reese v. Mitchell*, 41 Ill. 365; *Lemen v. Robinson*, 59 Ill. 115; *Arnold v. Stock*, 81 Ill. 407; *Ticknor v. McClelland*, 84 Ill. 471.

We re-affirm that there was no delivery of possession by Willard to McMahon such as to preclude Humes' rights, because to constitute such change of possession it must be open, visible, public and manifested by such outward signs as render it evident that the possession of the owner has wholly ceased. *Bump, Fraudulent Con.*, 114.

The delivery of possession must be accompanied with such unmistakable acts of control and ownership as a prudent, *bona fide* purchaser would do in the exercise of his rights, so that all persons may have notice that he owns and has possession of the property.

The length of time such possession should continue has been clearly pointed out by the Supreme Court; it must be long enough to apprise all parties of the change of ownership. *Cunningham v. Hamilton*, 25 Ill. 228.

LACEY, J. This was an action in replevin commenced before a Justice to recover the possession of the mare and horse in controversy, commenced by appellee against appellant, and judgment being rendered before the Justice for the appellant, the appellee appealed to the Circuit Court, where the case was tried by the court, a jury being waived, and the court found for him and judgment against appellee for costs, and he appeals to this court.

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It appears from the evidence that one F. M. Willard was the owner of the horses, and on December 13, 1882, mortgaged them to appellant to secure a note for \$250, due in one year from date. A day or two before the note and mortgage became due Willard drove the horses over to the farm of appellant and there was an attempted adjustment of the debt and sale of the team to appellant, and the note and mortgage was delivered up. But the team remaining in the possession of Willard, he, on the 25th of December, 1883, re-mortgaged them to appellee to secure \$190. Afterward in January, 1884, appellant replevied the horses from Willard, when thereafter, and after demand, appellee replevied them from appellant, claiming under his mortgage, and *that* is this suit.

The only point in dispute is whether the attempted sale from Willard to appellant was perfected by actual delivery of the possession of the horses to appellant so as to make a perfect and complete sale to him as against subsequent purchasers and incumbrancers. This is the only controlling question here.

There are only two witnesses to the transaction—Willard and appellant. After an agreement between Willard and appellant that the horses were to be taken by appellant in discharge of the note and mortgage and they were to be delivered to appellant at his house, appellant testifies as to what took place at the time of the attempted delivery as follows: “Willard came over to my place a day or two before my note and mortgage was due and said he had brought over the team to deliver it up and get the note and mortgage. I got the note and mortgage and went out with him to where the team was tied to my hitching rack and I took hold of the halters and looked into their mouths, asked Willard how old they were and asked him about a place on the mare where the skin was broken. I then gave Willard the note and mortgage as he said he would not give up the horses unless I gave up all the papers; so I gave them to him. I asked him what he was doing; he said he was gathering the rent corn, due for land which I had rented to him and he wanted to borrow the team to finish it, so I loaned him the team to gather the said rent

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corn and told him where to put it. He said it would take three or four days to finish gathering the corn and he took the team and went back. He was at my place about half an hour. He refused to return the team and I had to replevy them."

Willard testified on the subject of delivery: "When I went to settle the mortgage up I took the team over to McMahill's; hitched them up to the hitching rack and went to his house and told him I brought the horses over to settle up this mortgage. I wanted the use of the team a year and McMahill said he did not know about that. He gave me the note and mortgage and asked me some questions about them, as to their age and how the mare got some skin rubbed off her. He also asked what I was doing; told him I was gathering the rent corn. He told me to go back and finish gathering it and I went back and went to work." This was all the evidence on the subject of the delivery of the horses by Willard to McMahill. The appellant relies for reversal on the authority of *Brown v. Riley*, 22 Ill. 46; *Wright v. Grover*, 27 Ill. 430; *Neece v. Haley*, 23 Ill. 417; *Funk v. Staats*, 24 Ill. 645; *Cunningham v. Hamilton*, 25 Ill. 231; *Reynolds v. Patterson*, 4 Ill. App. 183.

There can be no question that, after verbal sale and delivery of chattel property, or after *bona fide* delivery of mortgaged chattels to the mortgagee in satisfaction of the debt, the vendee or mortgagee may temporarily loan the same to the vendor or mortgagor, or employ the latter to use the chattels in the service of the vendee without invalidating the title. But in this case it is a question whether the actual possession required by law was ever taken by appellant before the horses were re-mortgaged to appellee, and the key note on which the decision of this case rests is found in *Cunningham v. Hamilton*, 25 Ill. 228, where the court says "the possession of the mortgagee must be long enough to apprise all parties of the change of ownership." That can not be said to have been done in this case. Because the horses were hitched at appellant's rack for half an hour it can not, with reason, be claimed that actual possession was taken by him in the manner the law requires.

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There were abundant grounds in the evidence to justify the court in finding that the delivery of possession "was not long enough to apprise all parties of the change of ownership."

In fact there was no delivery of possession at all either symbolical or otherwise. The evidence also, we think, fully justified the court in finding that appellee was an innocent purchaser without negligence. But when it is considered that the finding of a court, like the verdict of a jury, must be conclusive, unless we can see that such finding is manifestly against the weight of the evidence, it will be seen that there can be but slight grounds upon which a reversal could be based.

We therefore find there is no error in the record, and order that the judgment be affirmed.

Judgment affirmed.

JAMES K. EAGLE AND GEO. R. LETOURNEAU

V.

MOSES ROHRHEIMER.

Chattel Mortgages—Sale to Mortgagee—Validity of—Change of possession—Loan—Replevin—Evidence—Vendor can not Impeach Title of Vendee.

1. After a valid sale and delivery of chattel property, or after a *bona fide* delivery of mortgaged chattels to the mortgagee in satisfaction of the debt and possession taken by the mortgagee, the vendee or mortgagee may temporarily loan such chattels to the vendor or mortgagor, or employ the latter to use them in his service without invalidating his title. But in order to make such transfer of property valid as against third parties there must be a substantial change of possession of such character or duration as would reasonably notify other persons that the property was transferred and the ownership changed.

2. In an action of replevin to recover certain personalty as the property of the mortgagor thereof, it is *held*: That, under the evidence, there was no apparent change of possession of a horse, for which the mortgagor had given a bill of sale to the mortgagee; and that evidence of statements made by the former as to the date of the bill of sale was properly excluded, as the vendor can not be heard after sale to impeach the title of the vendee.

Eagle v. Rohrheimer.

[Opinion filed December 11, 1886.]

APPEAL from the Circuit Court of Kankakee County; the Hon. ALFRED SAMPLE, Judge, presiding.

In connection with this case see the preceding case of *McMahill v. Humes*.

Mr. H. K. WHEELER, for appellants.

Messrs. LAKE & POTTER, for appellee.

BAKER, P. J. This was a replevin instituted by Rohrheimer against James K. Eagle and George R. Letourneau for the recovery of certain personal property that had been levied on by Letourneau, Sheriff of Kankakee County, by virtue of an execution issued on a judgment in the Circuit Court of said county for \$1,510 and costs, in favor of Eagle, and against James H. Craddock. Pleas were filed that justified the taking under said execution, and claimed that the property belonged at the time of the levy to Craddock. The result of a jury trial was a verdict and judgment in favor of Rohrheimer for all of the property in dispute.

A horse, buggy, cutter and set of single harness, constituting a part of the articles that were in controversy, had belonged to Craddock, and he had given to Rohrheimer a chattel mortgage upon them to secure a debt that matured January 28, 1884.

An absolute bill of sale, bearing the date mentioned, was executed by the mortgagor to the mortgagee for the property covered by the mortgage in satisfaction of the debt. The execution was levied on the 14th day of February, 1884.

We are of opinion the evidence does not sufficiently sustain the verdict of the jury upon the question of the ownership of the horse. After a valid sale and delivery of chattel property, or after a *bona fide* delivery of mortgaged chattels to the mortgagee in satisfaction of the debt and possession taken by the mortgagee, the vendee or mortgagee may temporarily loan such chattels to the vendor or mortgagor, or employ the

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latter to use them in the service of the vendee or mortgagee, without invalidating the title. But, in order to make such transfer of property valid as against third parties, there must be a substantial change of possession, a change of such character or duration as would reasonably notify other persons the property was transferred and ownership changed.

In this case, after the date of the bill of sale and up to the time of the levy, the horse was left in the possession and control of Craddock, the original owner, the same as theretofore. He, and the members of his family and his employes, continued to use it both in their business and for pleasure; and it was fed, watered and attended to by his family and servants. Only five days before the levy he had the four shoes of the horse set, and paid for the work; and at the very time it was levied upon, it was being fed and watered by his brother. It is true the horse was kept in the barn of Rohrheimer, but then the barn was rented by Craddock, and the horse had been kept there both before and after the date of the bill of sale. Appellee testified that he hired John Coyn to take care of the horse, but according to the testimony of Coyn, Craddock kept the horse there, and continued to use him as long as he was there, and Craddock's stepson took care of him. It does not appear that appellee ever used the horse, or ever paid anything for its keeping. The decided weight of the evidence is that there was no apparent change of possession, and that third parties could not possibly have been apprised from the surrounding circumstances that there had been a change of ownership. This was not a case of a mere temporary borrowing by the vendor, but a case of continued possession and use by him.

The ruling of the court in excluding from the jury, evidence of the statements made by Craddock as to the date when the bill of sale was in fact executed, was right; even though it was proposed to show in connection therewith that such statements were made while he was in possession of the property. The law forbids that a vendor should after sale be heard to impeach the title of the vendee. The case of *Amick v. Young et al.*, 69 Ill. 542, we do not regard as an authority in point. The

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declarations there considered were not those of a vendor against the interest of his vendee; and besides, the declarations were those of a person who, at the time they were made, was in actual possession of the property, exercising full control over it, offering to sell it, and claiming it as his own, and what he said under such circumstances was held to be a part of the *res gestæ*, and therefore legitimate evidence.

In the present litigation the statements excluded were those of a person not claiming at the time they were made a present interest in the property under discussion, and were a mere narration of past transactions, and such narration was wholly unconnected with and formed no part of the transactions themselves, and consequently were not a part of the *res gestæ*.

The court very properly modified the 6th instruction for appellants, by eliminating the particular circumstances that was incorporated in it. Appellants claim that it was a strong circumstance, and that the attention of the jury should have been called to it as one of the badges of fraud. We may remark that it was not a conclusive circumstance, and that it was no part of the duty of the trial court to make an argument to the jury in behalf of either party to the suit and call the special attention of the jurors to particular but inconclusive facts in proof. Such mode of instruction is likely to mislead the jury, by giving undue importance to the circumstances that may be thus singled out from the bulk of the testimony.

The verdict of the jury improperly awarded the horse to appellee. The motion for a new trial should have prevailed, and it was manifest error to overrule it; for that error the judgment is reversed and the cause remanded.

Reversed and remanded.

Ginders v. Ginders.

GEORGE GINDERS, ADMINISTRATOR, ETC.,
V.
JULIA M. GINDERS, CLAIMANT, ETC.

Administration of Estates—Claim for Services Rendered by Member of Family—Rules—Presumptions—Burden of Proof—Instructions—Evidence—Admissions of Intestate, Admissible—Express and Implied Contracts.

1. Where persons reside together as members of one family, and one of them renders services to the head of the family, the law does not imply a promise to pay therefor, nor a promise on the part of the one rendering such service to pay for maintenance, the presumption being that both services and maintenance are gratuitous.

2. Where services are rendered within the family, under the rule of this State there can be no recovery against the head of such family unless it appears that there was an express promise to pay, or that the services were rendered under the expectation of both parties that payment was to be made, the burden of proof being upon the one who seeks to recover for such services.

3. Both an express and an implied contract can not exist at one and the same time concerning one and the same subject-matter.

4. In the case presented, in which the daughter-in-law of the deceased seeks to recover from his estate compensation for services rendered as a member of his family, it is *held*: That certain instructions were erroneous for improperly stating the rule as to the burden of proof and ignoring the circumstances surrounding the claimant, the intestate and her infant children; that statements made by the intestate relative to leaving the claimant a home were properly admitted; and that, if the services were rendered under an agreement that the intestate would by will or otherwise provide the claimant a home and support upon his death, and he failed to do so, she may recover upon a *quantum meruit* for the five years not barred by the Statute of Limitations.

[Opinion filed December 11, 1886.]

APPEAL from the Circuit Court of Ogle County; the Hon. WILLIAM BROWN, Judge, presiding.

Mr. N. C. WARNER, for appellant.

In the case of children after they attain majority, or grandchildren, or nephews and nieces who live with a relative or parent as members of his family, without any contract or un-

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derstanding that he shall pay for their maintenance, the law will not imply a promise to pay on either side. *Robinson v. Cushman*, 2 Den. 149; *Andrews v. Foster*, 17 Vt. 556; *Fitch v. Peckham*, 16 Vt. 150; *Guffin v. First Nat. Bank*, 74 Ill. 262; *Owen v. Parsons*, 5 Watts & S. 357, 513; *Wier v. Wier*, 3 B. Mon. 645; *Funk v. Lawson*, 12 Ill. App. 229.

Where parties competent to contract, enter into an arrangement by which one becomes a member of the family of another, under circumstances that forbid the idea of a promise or contract for pecuniary compensation, no action will lie to recover such compensation for services rendered during the existence of such arrangement. Promises are implied in consequence of the nature of the transaction. And it is only where there is no express promise that the law will sometimes imply one. Implied promises only arise where reason and justice dictate that a person should do the thing which the law thus implies he has agreed to do. No implied contract will arise to pay for services rendered by, and between members of the same family. *Hall v. Finch*, 29 Wis. 278; *Andrews v. Foster*, 17 Vt. 556; *Duffy v. Duffy*, 4 Pa. St. 399.

Transactions of this kind stand upon a different footing from those between persons who are not bound together by family ties. *Van Kuren v. Saxton*, 3 Hun (N. Y.), 547; *Wilcox v. Wilcox*, 48 Barb. 327.

The relationship between the parties prepares the mind at once to believe that Henry Ginders was extending to appellee and her children the hospitality and comfort of a home in her widowhood and their orphanage, and was not keeping them for any mercenary consideration, and as they did not pay for board, and were not in the attitude of servants, no presumption will be indulged that appellee then expected pay for services. *Fruitt v. Anderson*, 12 Ill. App. 421; *Myers v. Malcom*, 20 Ill. 621.

Where two parties understand they are mutually receiving and rendering favors with no present design to make them pecuniary charges against each other, no recovery can be had by either. *Dunlap v. Allen*, 90 Ill. 108; *Jared v. Vanvleet*, 13 Ill. App. 334.

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The family relation is itself strong negative proof, and raises a presumption that no payment or compensation was to be made beyond that received by claimant at the time, which can only be overcome by clear and unequivocal proof to the contrary. The evidence must be clear, direct and positive that the relation was not a family relation, but was the relation of debtor and creditor, or master and servant. To establish such relation it is evident some new arrangement or contract to that effect must be shown. No man is made a debtor without his knowledge or consent, or under circumstances where he has no reason to expect that such was his position. We find the best considered authorities hold that an express contract must be shown. *Deitrich v. Waldron*, 90 Ill. 115; *Hall v. Finch*, 29 Wis. 286; *Hartman's Appeal*, 3 Grant's Cases, 271; *Duffey v. Duffey*, 44 Pa. St. 402; *Bash v. Bash*, 9 Pa. St. 260.

Mr. J. C. GARVER, for appellee.

BAKER, P. J. This controversy grows out of a claim for \$3,000, filed by Julia M. Ginders, appellee, against the estate of Henry Ginders, deceased, for services rendered him in his lifetime.

In 1871 the deceased was living with his wife on his farm in Ogle County, Illinois. They had two children, both sons; the elder, George, had married and moved away some years prior to that time, and the younger, Joseph, was living with his parents. In that year Joseph was married to appellee, and she immediately made her home on the farm with her husband and his parents. Shortly thereafter the wife of Henry Ginders died, and from that date Joseph and his wife continued to live with said Henry for some seven years and until the death of Joseph in January, 1878. The latter left surviving him, his widow, the appellee, and two infant daughters, now about thirteen and eleven years of age, respectively. Appellee and her two daughters remained on the farm with Henry Ginders, the deceased, who was father-in-law of the one, and grandfather of the others, and continued to make his house their home, until

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his death on the 20th of February, 1885. Joseph left appellee and his children almost wholly unprovided for, and they seem to have remained with deceased as members of his family. Appellee was an industrious and thrifty woman, managed the house and attended to all the necessary and usual household duties, did the cooking for deceased and his hired man, and nursed and took care of the former in his old age and last sickness. There appears to have been an arrangement between appellee and her father-in-law, that she was to have the dairy and poultry products of the farm, and out of their proceeds supply the family groceries, flour and meat excepted, and use the residue for clothing her children and herself.

It further appears that she not only did this, but was able to purchase many articles of household furniture, which she still retains. It was stipulated upon the trial that Henry Ginders died intestate and left as his only heirs at law, his son, the appellant administrator, and his two granddaughters, and that he died seized of unincumbered real estate of the value of \$5,000 and of \$2,900 in personal property, and that his estate was at the time of his death practically free from debt, unless it be the claim made by appellee is a just debt.

Ordinarily, where one person labors or performs services for another, a presumption of fact arises that the person for whom the labor is done or services performed is to pay the value of such labor or services. But, where persons are living together as members of one family, and a member of such family renders services to the head of the family, the law does not imply a promise to pay therefor.

And so, on the other hand, there is not, in such case, an implied promise that the member of the family will pay the head of the family for board and maintenance. Within the family the presumption is that both services and maintenance are gratuitous. Such presumptions, however, are mere presumptions of fact and may be rebutted.

Some of the courts have held that within the family relation and between a member and its head, there can, under no circumstances, be a recovery upon an implied contract for work and labor, and that it must be shown that an express contract

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was actually made. The rule is not held so strictly in this State. Here we understand the doctrine to be, that where services are rendered within the family there can be no recovery against the head of such family, unless it be shown, either that there was an express promise to pay, or that the services were rendered under the expectation of receiving pay therefor on the one side, and under the expectation of paying therefor on the other side. The following authorities sustain this view of the law. *Myers v. Malcom*, 20 Ill. 621; *Freeman v. Freeman*, 65 Ill. 106; *Miller v. Miller*, 16 Ill. 296; *Morton v. Rainey*, 82 Ill. 215; *Guffin v. National Bank*, 74 Ill. 262; *Dunlap v. Allen*, 90 Ill. 108.

The fact that the services were rendered for which this claim was made, was not a matter of contention on the trial, but the contentions of appellant were, *first*, that the services were gratuitous, and, *second*, that they were rendered under a special contract that in consideration of them appellee was to receive the dairy and poultry products of the farm, less the cost of family groceries, and a home and living for herself and children during the lifetime of the intestate. As appellee was a member of the family of appellant's intestate when the work and labor was done, the presumption was that they *were* gratuitous; and the burden was upon appellee to either prove an express promise to pay or else show that it was the intention of appellee to receive pay, and the intention of the intestate to make payment for the services performed. The jury should have been instructed that appellee had the burden of proving a cause of action against the estate; that this could only be done in one or the other of the two modes above mentioned, and that the mere performance of services by her for the deceased did not make out a case against the estate.

The first instruction given for appellee was "that the burden of proof is upon the estate or the administrator to prove payment, if any is claimed to have been made." This was calculated to mislead the jury and induce them to believe that, as the rendition of the services was not a subject of contention, the law stepped in and implied they were to be paid for, and that as in ordinary cases where the services are not

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disputed, and payment is claimed, the burden is on the defendant.

The second instruction told the jury that if they believed from the evidence that "there was an express or implied contract, and that the services were rendered by claimant, and have not been paid for, then the claimant is entitled to recover in this action."

This, also, under the circumstances of the case on trial, was misleading. It did not draw the distinction between the case at bar and ordinary suits for work and labor, and from it the jury might readily conclude that if the services were performed and not paid for, then there was an implied promise or contract to pay.

The third instruction was as follows: "If you believe from the evidence that the claimant did, within five years next preceding the death of Henry Ginders, perform labor and services for said Henry Ginders, at his request, and that no price was fixed or agreed upon, and that the same has not been paid, then the law will imply a promise from said Henry Ginders to pay claimant in this proceeding for such labor and services, what, if anything, the same are reasonably worth."

This instruction might have been well enough in some cases and as applied to a proper state of circumstances, but as applied to the case in hand it was very clearly vicious and erroneous; it omitted the very important fact that the claimant when she performed the labor was a member of the family of Henry Ginders; and that being a fact in the case, the law does not, from the facts stated in the instruction, imply a promise to pay. Where a member of the family does work for the family at the request of the head of the family, the law will not imply a promise on the part of such head of the family to pay therefor, unless it appears that it was the expectation of both parties, at the time the labor was performed, that it would be paid for. The fourth instruction is similar to the third, and is liable to the same objections. It contains the qualification, "Unless it shall appear from all the evidence that such work and labor were done under a special contract, or as a gift or gratuity;" but this did not cure the defects; it

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left the burden upon appellant to show by his affirmative evidence that the work was a gratuity, whereas it was a presumption that followed from the relations of the parties that it was a gratuity, and the burden was upon appellee to rebut such presumption.

The sixth instruction informed the jury that it was "wholly immaterial what share the little girls of claimants may be entitled to in the estate of their grandfather, as his heirs." We think this was erroneous ; it excluded from the jury as wholly immaterial a circumstance the jury might properly take into consideration.

The circumstances surrounding the intestate, and appellee, and her infant children, the fact the first mentioned had made no will, that he had considerable property, that the daughters of appellee were the prospective and afterward actual heirs to a moiety of his estate, may all be regarded in connection with the other testimony in determining the intentions and expectations of the parties to the transactions here involved.

We see no valid objection to the ruling of the court admitting in evidence the testimony of Kittlewell, Letts and Fay in regard to statements made by Henry Ginders with reference to leaving appellee a home, and making provision for her and her children ; or to the ruling that permitted Agnew and Kelley to testify to the conversations that occurred between the deceased and appellee, while the former was in his last sickness. In a litigation against an administrator, the admissions of his intestate are competent evidence against such administrator.

It is true that both express and implied contracts can not exist at one and the same time concerning one and the same subject-matter. But this rule, *ex vi termini*, has application only where the subject-matter is the same or where the two contracts cover the same ground as to subject-matter. It is not legally impossible that it may have been the understanding and intention of both appellee and the intestate, that the former should serve as housekeeper for the latter during his lifetime, and that in consideration thereof he would, at or before his death, provide for her a home, or make provision for

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her support, and at the same time there have been an arrangement between them that, in the meanwhile and during the lifetime of intestate, she should have the excess of the dairy and poultry products for clothing herself and children, and for her own use and purposes. Of course, if it should be found as matter of fact that the arrangement was as broad as is contended for by appellant, and that the dairy and poultry products and temporary home and living for appellee and her children covered the ground of compensation for services, then it would not be legally admissible to say there was a different and implied contract.

If the services of appellee were rendered under an agreement with the deceased that she would remain with and work for him during his lifetime, and that he would, by will or otherwise, provide her a home and support upon his death, and he did not do so, then appellee may recover of his administrator as upon a *quantum meruit*; but, the Statute of Limitations being interposed, could only recover for five years next before presenting her claim, deducting the time that elapsed between the death of intestate and the day fixed by the administrator for the adjustment of claims against the estate. *Freeman et al., Admrs., v. Freeman*, 65 Ill. 106.

The view we have taken of the case obviates the necessity of considering the motion and cross-motion that were reserved to the hearing.

For the errors in the instructions of the court the judgment is reversed and the cause remanded.

Reversed and remanded.

Aarvig v. Kellogg.

OLE H. AARVIG, FOR USE OF NELS OLSON,

V.

N. H. KELLOGG ET AL.

Statute of Limitations—Justices' Judgments not within Sec. 15. but within Sec. 16—"Other Evidences of Indebtedness"—Construction of.

1. A Justice's judgment is not within Sec. 15. Chap. 83, Starr & C. Ill. Stat., which limits the time within which to bring certain actions to five years.

2. Such a judgment is included within the words: "Other evidences of indebtedness in writing," found in Sec. 16, which limits the time within which to bring the actions therein included to ten years.

[Opinion filed December 11, 1886.]

APPEAL from the Circuit Court of Livingston County; the Hon. ALFRED SAMPLE, Judge, presiding.

Messrs. H. H. McDOWELL and A. C. NORTON, for appellant.

Messrs. MOILDUFF & TORANCE, for appellee.

LACEY, J. Olson recovered a judgment before the Justice of the Peace against Ole H. Aarvig, the appellant, for the sum of \$75.75, upon which execution was issued January 24, 1879, and was returned "no property found" by the Constable. A transcript from the judgment was filed in the clerk's office of the Circuit Court, January 24, 1879, and execution on transcript on the 24th of July, A. D. 1884, and returned October 24, 1884, "no property found."

Garnishee proceedings were commenced on the judgment from before the Justice of the Peace against appellee by Olson in the name of appellant, to recover the amount of the judgment and costs, May 7, 1885, being six years and five months from the date of the rendition of the judgment. The cause came to the Circuit Court by appeal from the judgment

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before the Justice. In the Circuit Court appellees and appellant Aarvig, moved to quash the writ and dismiss the suit, which motion was sustained by the Circuit Court, and the suit dismissed on the ground that the judgment before the Justice was barred under Sec. 15 of the Statute of Limitations.

This action by the court was induced by the holding of the Supreme Court in Bemis v. Stanley, 93 Ill. 230, in which it was held that a foreign judgment was barred by Sec. 15 of the Limitation Act in five years' time. Sec. 15, Limitation Laws of 1872, provides as follows: "Actions on unwritten contracts, express or implied, or on awards of arbitration, or to recover damages for an injury done to property, real or personal, or to recover the possession of personal property or damage for the detention or conversion thereof, and all civil actions not otherwise provided for shall be commenced within five years next after the cause of action accrued." In the above case of Bemis v. Stanley, the judgment sued on was obtained in the State of Ohio, March 10, 1859, and the suit was commenced in this State August 10, 1877, the judgment being over eighteen years old and barred as well under Sec. 16 of the Limitation Law of 1872, which provides that, "actions on bonds, promissory notes, bills of exchange, written leases, written contracts or other evidences of indebtedness in writing shall be commenced within ten years next after the cause of action accrued." So we see as to the matter before the Supreme Court the decision was correct under either of the statutes. Another fact we observe, and that is the attention of the court was not called to Sec. 16 at all. However, the Supreme Court may have intended to hold on that point as to foreign judgment, we think, as applied to judgments before Justices of the Peace in this State, Sec. 15 does not apply, but that such judgments must be classed under the head of "other evidence of indebtedness in writing" contained in said Sec. 16. It is contended by appellee that the words, "other evidences of indebtedness in writing" should be held to mean the same character of evidence of indebtedness in writing as those defined by the particular words in the same section, preceding such general words, citing Broom's Legal Maxims (7th Ed.)

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651, and cases cited. In other words, that Sec. 16 can refer only to "evidences of indebtedness in writing" which are voluntarily executed by the parties, and that those are the evidence of indebtedness defined by the particular words. The authority cited undoubtedly announces an excellent rule of law but we think an improper and mistaken application is attempted to be made of it. It is evident that the Legislature intended to use the term, "other evidence of indebtedness in writing," as a general expression covering every species of evidence of indebtedness in writing without reference to the manner in which it was created. If the Legislature had intended to restrict this class of indebtedness in writing to those writings which had been voluntarily entered into by the party, some such restrictive words would have been used to limit the general sweeping terms, "other evidence of indebtedness in writing," which, of themselves, are capable of including every species of indebtedness, the evidence of which exists in writing, and we have no doubt was intended to include all. Again, the term "other evidence of indebtedness in writing" is used to cover cases not included in the term "written contracts," which just precedes it in the enactment. As a rule it has always been the policy of our Legislature to fix longer terms of limitations to contracts in writing than to those in parol, for the reason they are of a more solemn character and abuse is less liable to be worked against the debtor in case of a considerable time elapsing after their falling due and before suit; and more especially judgments have been given longer lease of life than almost any other evidence of indebtedness in writing. Even now by our statute judgment of courts of record in this State have their limitation fixed at twenty years. In all the sections of the act in question where the character of the cause of action is mentioned specifically, and a less time than ten years is fixed, one contract or written evidence of indebtedness alone is fixed at five years, and that is "awards of arbitration." In all actions of less limitation the evidence of debt is not in writing. From this view and construing all the sections of the act together, and keeping in mind the general policy of the law, it is evident the Legislature did not intend by Sec. 15 to fix the limitation of Justices' judgments to the

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short period of five years. If the construction contended for by appellee should prevail, there would arise great lack of harmony and incongruity in the provisions of our statute in reference to Justices' judgments. Sec. 1, Chap. 77, R. S., provides, "that a judgment of a court of record shall be a lien for seven years;" and Sec. 95, Chap. 79, provides, "that when a transcript from a judgment from a Justice of the Peace is filed in the Circuit Court it shall thenceforward have all the effect of a judgment of the Circuit Court." In Seymour v. Haynes, 104 Ill. 557, it was held that the original judgment was not altered or suspended by reason of transcript having been taken and filed in the Circuit Court; that this is only an additional method of collection. By this rule it would follow, that in case the judgment before the Justice were satisfied of record, or barred by the Statute of Limitations, the transcript judgment, if it may be so termed, would also be satisfied or defunct, for the satisfaction or extinction of the one would necessarily work the satisfaction or the extinction of the other. And the Justice's judgment is the principle, and the transcript the incident or means only by which the former may be satisfied. This being so, if the Justice's judgment is held to be barred under Sec. 15 after five years from its date, it would be impossible for the transcript judgment to remain a lien for seven years the same as judgments in courts of record, as is provided by statute in case of such judgments. But if Justices' judgments are barred only under Sec. 16 of the Limitation Act after ten years, then in case the transcript be taken within three years after the rendition of the judgment, the transcript judgment could, under the foregoing provisions of the statute, run the entire seven years and the statute have a uniform and harmonious operation, which we have no doubt the Legislature intended. We therefore hold that the limitations for the commencement of actions on Justices' judgments is ten and not five years, and that Sec. 16 of the Limitation Act governs them. The court below therefore erred in sustaining the motion to dismiss the suit. The judgment of the Circuit Court is therefore reversed and the cause remanded.

Judgment reversed and cause remanded.

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HELEN C. BOYER

V.

ESTATE OF JULIUS A. BOYER.

Widow's Award—Secs. 74 and 75, R. S.—Construction—Allowances to be Reasonable—Appraisement—What Need not be Appraised—County Court may Set Aside Estimate—New Appraisement—Removal of Appraisers—Jurisdiction of Circuit Court—Allowance of Amendment—Discretion—Practice.

1. The appraisers, in making their estimate of the widow's award under Secs. 74 and 75, Chap. 3, R. S., are not required to estimate the value of the family pictures and wearing apparel, the jewels of the widow and her minor children and the stoves and pipe used in the family, with the necessary cooking utensils, all of which are to be included in the award without regard to their value.

2. The County Court may set aside an appraisement bill, or a report of appraisers making out and certifying an estimate of the value of the items allowed by statute as the widow's award, and order a new appraisement, or remove the appraisers and appoint others to make such new appraisement.

3. While the statute with respect to widows' awards should be literally construed, its construction should be reasonable and the allowances made under it should be within the bounds of reason.

4. In the case presented, it is *held*: That the County Court properly ordered the appraisement and award set aside; that the action of the Circuit Court in refusing a motion to allow the widow to amend the estimate because of the insertion therein of improper items, even if not within its discretion, was justified by the extraordinary allowances made by the appraisers; and that said court committed no error in ordering the affirmance of the order of the County Court.

[Opinion filed December 11, 1886.]

APPEAL from the Circuit Court of Will County; the Hon. DORRANCE DIBELL, Judge, presiding.

Messrs. H. F. VALLETTE, for appellant.

Messrs. OLIN & PHILIPS, for appellee.

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LACEY, J. This was an appeal from the order of the County Court, setting aside widow's award and appraisement.

The Circuit Court overruled motion to refer the award to the appraisers to be again considered, setting aside appraisement bill and widow's award, affirming the order of the County Court and giving judgment against the widow for costs. The appeal is taken to this court by the widow, and the action and judgment of the Circuit Court sought to be reversed.

The deceased, Julius A. Boyer, died leaving an estate consisting of personalty to the amount of over \$135,000, leaving a widow and three minor children. The widow, Helen C. Boyer, was duly appointed administratrix and James L. Dunton, Michael Waller and John W. Arnold were duly appointed appraisers, and on the 29th of July, 1885, they made out their appraisement bill and estimate of the amount to be allowed to the widow as her award, the appraisement bill showing that the personal property subject by law to such appraisement amounted to \$806.50 in value, and that the estimated amount to be allowed as the widow's award was the sum of \$7,075.

The County Court set aside both the widow's award and appraisement so made, and appeal was taken to the Circuit Court, and upon hearing the Circuit Court affirmed the order of the County Court, and this appeal is taken.

After the case was in the Circuit Court the administratrix, discovering that the widow's award presented to the County Court was erroneous in important particulars, and could not be sustained, procured the appraisers to make out a new or amended estimate of the widow's award fixing the sum total at \$6,629 instead of \$7,075 as in the original. She moved the court for leave to amend and for leave to substitute the new estimate for the old, which the court refused, and entered the order setting aside both the appraisement and award and affirming the order of the County Court.

This action of the Circuit Court is particularly questioned, and assigned for error. In refusing this request we see no error. Whether or not the court had the power in its discretion to allow the amendment, it certainly was no error to refuse to allow it under all the circumstances. The Legislature

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has designed the County Court to have especial jurisdiction of matters of probate and the setting up of estates, and the Circuit Court can not take to itself the administration of estates unless under certain circumstances. *Wood v. Johnson*, 13 Ill. App. 555, and cases there cited.

The County Court has a right for cause shown, to set aside an appraisement bill, or a report of appraisers making out and certifying to that court an estimate of the value of the items of property mentioned in the statute as the widow's award, and to order the appraisers to consider the subject again, and for cause shown, might remove the appraisers and appoint others and charge them with these duties. *Miller v. Miller*, 82 Ill. 463, 470.

The Circuit Judge who tried the cause might very well have considered that, in view of the extraordinary developments contained in the amended estimate, that it was a fitting question for the County Court to consider whether it would not remove the appraisers, and that the Circuit Court ought not to be diverted from a consideration of the matter appealed from, into an administration of the estate, thereby usurping the jurisdiction of the County Court, and for those reasons have refused the motion. And we can not say it was error to do so.

The next question is, did the Circuit Court err in sustaining the order of the County Court? We think not. It is admitted by appellant that the following allowance of items by the appraisers was erroneous, to-wit: The family pictures and wearing apparel, jewels and ornaments of the widow and minor children, \$2,000, and the stoves and pipe used in the family, with necessary cooking utensils, \$400, making \$2,400. See Secs. 74 and 75, Chap. 3, R. S. These items were not allowable under the statute, and it was these that it was desired to correct by the new estimate of the widow's award. But how was it corrected? The new award submitted will show. The objectionable items were stricken out, and most singularly the appraisers attempted to compensate the widow for it by adding nearly the entire amount to other items of the award, as follows: In the first appraisement of the widow's award

the appraisers estimated necessary beds, bedsteads and bedding for the widow and family at \$1,000, and one sewing machine was not estimated, and provisions for the widow and family for one year was put at the round sum of \$2,500. In the amended appraisement the sum of \$1,200 was added to the item for necessary beds, bedsteads and bedding for the widow and family, and the extraordinary price of \$200 was added for the sewing machine, and \$500 was added to the item for provisions for the family for one year, and another milch cow was added at \$50. The appraisers were acting under the *same oath* at the time each estimate was made, and no explanation of how or why this great change was effected. It appears to be a remarkable case of forcing results, and the new estimate to be born of a desire on the part of the appraisers to make up to the widow, without reference to a proper valuation, the loss, at least in part, sustained by the mistake. No court would be justified, in the face of such circumstances, in approving the amended report, and in fact it would be strong evidence going to show the bad faith of the appraisers in their former appraisement and the widow's estimate of award. It was in evidence that the deceased was a free liver; that he spent on his living expenses from \$7,000 to \$10,000 per annum, and kept as many as four servants; yet the entire estimate of all his household goods, carpets, stoves, library, beds and bedding, all his horses and carriages and furniture and utensils about the house, only amounted to \$806.50; but what he should have had or the widow should have to put her in keeping with the former life of her husband, would be \$7,075—a most remarkable result, indeed. Then some of the items—eight bedsteads and beds, \$60—and yet the widow was estimated to be entitled to \$1,000 in same, and in final report \$2,200. The other items in a measure correspond with this one cited. What faith could the court put in such reports and appraisements as these? While the statute with respect to widow's awards should be liberally construed, yet the allowances should be within the bounds of reason, and the construction given should be reasonable. While there are no creditors here, it appears that there are three minor children to be affected.

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See Strawn v. Strawn, 53 Ill. 263. We regard this case as an authority against the claim of appellant. The household and kitchen furniture, beds and bedding on hand at the time of the husband's death would presumably be sufficient to keep up the establishment after his death. It is not shown that the house was not sufficiently furnished at the time of the husband's death, nor is it shown that any additional beds were necessary. As to the sufficiency or correctness of the other items of the appraisement or award it is unnecessary to express an opinion, as a new one must be made out by the same or some new appraisers to be appointed by the County Court. The point made that the court erred in ordering the judgment of the County Court to be affirmed, is not well taken; the Circuit Court, if it will, may adopt the order of the County Court.

Besides, the order is that the appraisement and award be set aside. It is all that it need be. Perceiving no error in the record the judgment of the court below is affirmed.

Judgment affirmed.

21	538
63	344

JOHN F. SMITH, H. J. PORTER AND SIDNEY SMITH

V.

SAMUEL S. TAGGART.

Action for Injuries—Negligence of Warehousemen in Excavating under Driveway—Instructions—Damages, not Excessive—Evidence—Res Gestæ—Statute of Limitations—Amendment of Declaration—New Cause of Action.

1. While a new cause of action can not be injected into a pending litigation by amendments or additional counts to the declaration, so as to avoid the plea of the Statute of Limitations, if the amendment or additional count is a mere restatement of the original cause of action, the bar of the statute will not apply.

2. In an action to recover damages for personal and other injuries alleged to have resulted from the negligence of the defendants in excavating under a driveway leading to their warehouse, it is *held*: That the amendment to the declaration, if necessary, was merely a restatement of the same cause of action; that evidence of the plaintiff's inability to do his usual work, and

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of the gentleness of his horses, was properly admitted; that a verdict for \$500 in favor of the plaintiff is not excessive, and is sufficiently sustained by the evidence, although conflicting, there being no question of the gross negligence of the defendants; and that the instructions, which were numerous, were substantially correct, being especially as favorable to the defendants as they could reasonably ask.

3. Where the court has properly instructed the jury on a given point, it is under no obligation to repeat the same principle of law in another instruction in different phraseology.

[Opinion filed December 11, 1886.]

APPEAL from the Circuit Court of Stephenson County;
the Hon. JOHN V. EUSTACE, Judge, presiding.

Mr. JAMES S. COCHRAN, for appellants.

The third instruction given for the plaintiff gives unbridled license to the jury to render a verdict for the full amount of proximate damages, if any, that they may believe from the evidence, he suffered by reason of such injury, without any limitation on the jury to the right of recovery for the negligence specified in the declaration. Under this instruction the jury may well have assumed to give the plaintiff damages for his mental suffering, prospective profits in business, loss in change of business, and any other proximate damages, although not specified in declaration. The plaintiff is limited in his right to recover to the injuries set forth in his declaration, and to such special damages as are specified in his declaration, and he can not recover any special damages outside of his declaration. *Camp Point Mfg. Co. v. Ballou*, 71 Ill. 417; *C. & A. R. R. Co. v. Mock*, 72 Ill. 141; *C., B. & Q. R. R. Co. v. Lee*, 68 Ill. 576; *C. W. D. R'y Co. v. Klauber*, 9 Ill. App. 613, 620.

Under this instruction, the jury may have thought that they had the right to find a mental suffering and anguish, which is not allowable. *I. C. R. R. Co. v. Sutton*, 53 Ill. 397; *Joch v. Dankwardt*, 85 Ill. 331.

It should have been more accurate. *C. & N. W. R. R. Co. v. Dimick*, 96 Ill. 42, 47; *C., B. & Q. R. R. Co. v. Van Patten*, 64 Ill. 510.

The sixth instruction assumes that if there was gross negligence, that such gross negligence was wilful and malicious.

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Gross negligence is defined to be the omission of those ordinary and reasonable precautions which every prudent man would observe for his own safety. *C. W. D. R'y Co. v. Klauber*, 9 Ill. App. 613, 623; *C., B. & Q. R. R. Co. v. Van Patten*, 64 Ill. 510; *C., B. & Q. R. R. Co. v. Lee*, 68 Ill. 576; *I. C. R. R. Co. v. Patterson*, 93 Ill. 290.

By this instruction the question of want of ordinary care on the part of plaintiff, the main theory of the defense, is absolutely ignored and obliterated, for the want of ordinary care is of no avail when the injury is wilfully and maliciously inflicted. *C., B. & Q. R. R. Co. v. Lee*, 68 Ill. 576; *St. L., A. & T. R. R. Co. v. Manly*, 58 Ill. 300; *C., B. & Q. R. R. Co. v. Johnson*, 103 Ill. 512, 521; *W., St. L. & P. R'y Co. v. Shacklet*, 105 Ill. 364, 370.

It is not proper by an instruction to announce what acts are negligent, and the degree of negligence which they prove. It is for the jury to say from the evidence whether either or both parties were guilty of negligence, and if so, its comparative degree. *Kolb v. O'Brien*, 86 Ill. 210.

An instruction is erroneous which is predicated on the assumption that there is evidence tending to prove a fact when there is no such evidence. *C., B. & Q. R. R. Co. v. Harwood*, 90 Ill. 425.

An instruction which allows a recovery for negligence in general respects, without limitation to the particulars of negligence specified in the declaration, is too broad. Recovery should be confined to causes averred in declaration. *C. & A. R. R. Co. v. Mock*, 72 Ill. 141; *Camp Point Mfg. Co. v. Ballou*, 71 Ill. 417; *C. W. D. R'y Co. v. Klauber*, 9 Ill. App. 613, 620.

The observance of ordinary care is an essential element to right of action in any case of negligence. *C., B. & Q. R. R. Co. v. Van Patten*, 64 Ill. 510, 516; *W., St. L. & P. R. R. Co. v. Thompson*, 10 Ill. App. 271, 275; *C., B. & Q. R. R. Co. v. Lee*, 68 Ill. 576; *I. C. R'y Co. v. Hetherington*, 83 Ill. 510, 515.

An averment of due care when traversed by the general issue can not be treated as an immaterial issue, and this

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issue can not be ignored. *W., St. L. & P. R'y Co. v. Shacklet*, 105 Ill. 364.

Each instruction should be correct in itself. The fact that proper instructions were given to the defendants will not cure the error in those given for the plaintiff in cases of this character. *Camp Point Mfg. Co. v. Ballou*, 71 Ill. 417; *C. & N. W. R'y Co. v. Dimick*, 96 Ill. 42, 47; *Morris v. Gleason*, 1 Ill. App. 510; *W., St. L. & P. R'y Co. v. Shacklet*, 105 Ill. 364; *C. & A. R. R. Co. v. Murray*, 62 Ill. 326; *Baldwin v. Killian*, 63 Ill. 550; *I. C. R. R. Co. v. Moffit*, 67 Ill. 431.

Messrs. J. C. GARVER and P. J. GREIB, for appellee.

BAKER, P. J. This was an action by Taggart against appellant to recover damages for personal injuries claimed to have been occasioned on the first day of August, 1882, through their negligence. The original declaration charged in substance, that appellants were at that date possessed of certain premises used by them for warehouse purposes, and for the receiving of grain, and of a certain drive-way leading up to the same and connected therewith, and that while appellee, with due care and without notice, was going upon said drive-way with his wagon and team, to deliver grain to said warehouse, the appellants wrongfully, negligently and unskillfully excavated under said way, so as to make the same unsafe and dangerous, and negligently suffered the same to be and remain in such dangerous condition, without suitable props or reasonable notice of such condition; and that by means of the premises and solely by reason of the negligence and improper excavation under said way, and its unsafe and dangerous condition, appellee was thrown, with his team, violently and unavoidably into such excavation, and thereby broke his wagon and harness, and was himself hurt, bruised, etc.

On the 14th day of December, 1885, the declaration was so amended as to charge, that the excavation was "under said messuage and premises, up to the said way and partly around one post on which a part of said way rested," and also charged

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that the injury was occasioned by reason of the negligent and improper excavation under said messuage and premises up to said way, and partly around one of the posts upon which said way rested, whereby said way became and was in an unsafe and dangerous condition.

It is objected that the negligence complained of in the original declaration was the excavation under the drive-way, whereas the negligence complained of in the amended declaration was the excavation under the warehouse and up to the drive-way, and partly around one of the posts supporting the drive-way; and it is claimed that this amendment introduces a new cause of action, and one to which the Statute of Limitations is a complete defense. We do not understand the pleadings in this case. The rule of law undoubtedly is that a new cause of action can not be injected into a pending litigation by amendments or additional counts to the declaration, so as to have the effect to avoid the plea of the Statute of Limitations. *I. C. R. R. Co. v. Cobb*, 64 Ill. 128, 140; *Phelps v. I. C. R. R. Co.*, 94 Ill. 548. But if the amendment or additional count is a mere restatement of the original cause of action, then the bar of the statute will not apply to it. In the *Cobb* case it was said: "Counsel for appellees cite various authorities for the purpose of showing that courts should be liberal in allowing amendments for the purpose of avoiding the running of the statute. These authorities, however, are cases where the amendment was for the purpose of restating the cause of action in the pending suit, and not for the purpose of introducing a wholly new and different cause of action." In the *Phelps* case, the matter at issue being the question of the bar of the Statute of Limitations, it was said: "The solution of the question depends upon whether the additional counts set up entirely new causes of action." In the *North Chicago Rolling Mill Co. v. Monka*, 107 Ill. 340, it was said: "The damages sought are for the same injury alleged to have resulted from the defectiveness or insufficiency of the same machinery, and that the existence of such defects was by reason of the fault of defendant. The substance of the additional count is identical with that of the first, varying

only in the description of the particular point in which the defendant was alleged to have failed in its duty to plaintiff." So, here, the injury mentioned in the declaration as amended, was the same as that mentioned before the amendment; both before and after the amendment it was the unsafe and dangerous condition of the drive-way that was alleged to have caused the injury, and the negligence of appellants that was averred to have occasioned such unsafe condition. The only difference was in the statement of the particular way in which appellants made the drive-way dangerous, and even in that respect there was but a slight variance, if any. We think the allegations of the declaration before and after the amendment were substantially the same; and even if the amendment was necessary, which is extremely doubtful, it was at most merely a restatement of the same cause of action. Our conclusion is, that the two years bar of the Statute of Limitations has no application to the case.

It was not error to permit appellee to state in his testimony that he had left his farm because he was unable to work it, on account of the injuries he had received. It was not stated or claimed as an element of special damage, and the fact he was unable to do his usual work was a circumstance tending to show the extent of his injuries. We are unable to see that there was any error in allowing the witness, Poffenberger, to testify that the horses the appellee drove at the time of the injury were gentle; the character of the horses for gentleness or otherwise was one of the circumstances connected with the *res gestæ* of the transaction.

The court refused to give the 12th instruction asked by appellants. Its substance was given in the 5th instruction of the series, which told the jury that there must be proof of ordinary care on the part of the plaintiff; that the gist of the action was the negligence of the defendants and ordinary care on the part of the plaintiff, and that unless these were established the defendants were not liable. There was, therefore, no error in refusing the 12th instruction, as the court was under no obligation to repeat the same principle of law in another instruction couched in variant phraseology. Objec-

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tions are made to the 3d, 6th, 7th and 10th instructions given at the instance of appellee. It is claimed the 3d instruction gives unbridled license to the jury to render a verdict for the full amount of proximate damages without limiting the jury to the negligence and the injuries specified in the declaration. As we read the instruction, the jury were informed in express terms that in order for plaintiff to recover it was necessary for him to prove that he was injured as stated in the declaration, and by the negligent act of the defendants as stated in the declaration, and that upon such proof, if made, he was entitled to the full amount of proximate damages, if any, that he suffered by reason of *such injury*. The point made is without merit. The 6th instruction defined gross negligence as meaning "a wrongful act or omission wilfully and maliciously done or omitted, or wantonly reckless conduct showing an utter disregard of the rights of others." It is urged this instruction assumes that if there was gross negligence, then such gross negligence was wilful and malicious. This is not a correct statement of the meaning of the instruction; that which it assumes is this: that if there was a wrongful, wilful and malicious act or omission, or wantonly reckless conduct that showed an utter disregard of the rights of others, then such act, or omission, or conduct, was gross negligence, and most assuredly it would be that, and even something worse. If the instruction is inaccurate, that inaccuracy is in favor of appellants, and they can not complain. The doctrine of comparative negligence was involved in the case, and it was claimed appellee had been negligent, and if that were found to be true by the jury and that appellee was guilty of even slight negligence, then it precluded the right of recovery unless the jury found the negligence of appellants was gross, and it followed that the greater the negligence was that was necessary in order to constitute gross negligence, the better for appellants. Appellee alone could be injured by the instruction. The 7th instruction was as follows:

"The court instructs you that when a tort or wrong is committed by an agent or employe in the course of his employment, and while pursuing his employer's business, the

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employer will be liable for any damages resulting from such tort or wrongful act, although it is done without the employer's knowledge or consent, unless the wrongful act is a wilful departure from such employment or business."

It is claimed that the right of recovery should have been confined to the causes alleged in the declaration, and that the instruction omits the duty of ordinary care on the part of the injured party. It will be noted that this instruction does not purport to lay down the ground upon proof of which a recovery may be had, and therefore the principles which are applicable to that class of instructions do not apply to it. The instruction merely states, and correctly states, an abstract rule of law. It does not pretend to state either the injury or the negligence necessary for a recovery in the particular case, nor do we understand that it is required in cases of this character that every instruction stating a principle of law should embody the legal formula with reference to ordinary care upon the part of the plaintiff. The criticisms upon the instruction are not well founded.

The 10th instruction contains two sentences that are lengthy and somewhat involved ; but it is plain from the context and the phraseology, connection and construction of these sentences, that they are to be considered together, and that they qualify and explain each other. There is no assumption in the instruction that it gives a catalogue of the facts that will justify a verdict for the plaintiff, but its evident function is to state and explain the doctrine of comparative negligence. Quite a number of facts are urged against it, and these may be briefly disposed of. The very first clause states in apt terms the requirement of reasonable care on the part of the plaintiff; the gross negligence of the defendants' servants was in law, the gross negligence of defendants themselves; in defining and explaining the rule of comparative negligence it is not requisite that the expression "the negligence of the defendants" should be qualified by the words "specified in the declaration"; it is not necessary to state that "the injuries complained of" were "directly" caused by the negligence of the defendants, in a cause where neither the pleadings nor the proofs

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claim or suggest either remote negligence, injuries or damages. The instruction is, in some respects, rather inartificially drawn, but we are unable to see it could have misled the jury; and the criticisms upon it are technical and too refined for the purposes of the substantial and practical administration of justice.

The evidence is somewhat conflicting, but the conflicts in the testimony have been decided by the jury in favor of appellee. We have carefully examined the evidence, and think that it sufficiently sustains the verdict. It tends to show the injuries received were painful, serious in their consequences, and permanent; and we are unable to say the damages awarded, \$500, are excessive. There is no question of the gross negligence of appellants and their agents and servants in so excavating under their elevator as to render the drive-way unsafe and dangerous, without giving any notification of such condition to the public whom they invited to deal with them and use it. The pit was not in sight, it was under the warehouse. It does not appear that appellee saw the earth that had been taken from the excavation and distributed in plain view of the road leading to the drive-way; but, even if he saw it, or was chargeable with notice it was there, yet as he was not notified of danger by the clerk who weighed his wheat at the scales, and the wheat could only be delivered by using the drive-way, and there was no warning or impediment placed at the drive-way, he had a right to rely upon its safety. The jury have passed upon the question of his supposed negligence, and we can not say their decision was wrong. The instructions were substantially correct; and in the eleven instructions given at the instance of appellants, the principles of law tending to this interest were as fully and as favorably given as they could reasonably ask.

We find no substantial errors in the record, and the judgment is affirmed.

Judgment affirmed.

Dodge v. Yates.

WILLIAM DODGE
V.
JOHN C. YATES.

Clause 9, Attachment Act, Sec. 1—Construction of Proviso—Recital in Receipt, a Sufficient Writing—Fraud.

1. The substance only of the statements constituting the fraud is required to be reduced to writing, to comply with the proviso contained in the 9th clause of Sec. 1 of the Attachment Act.

2. In the case presented, it is held that a receipt given to the "former guardian" of certain wards, and signed by the defendant as "succeeding guardian," is sufficient within said proviso to charge the defendant who falsely represented that he had duly qualified as such guardian.

[Opinion filed December 11, 1886.]

APPEAL from the Circuit Court of Peoria County; the Hon. T. M. SHAW, Judge, presiding.

Messrs. PUTERBAUGH & PUTERBAUGH, for appellant.

Messrs. STEVENS, LEE & HORTON, for appellee.

LACEY, J. This was a suit in attachment commenced by appellant against appellee, to recover the sum of \$1,923 84, wrongfully paid over by the appellant to appellee, under the following circumstances. On and prior to July 22, 1885, appellant was guardian of Jennie and Ida Watrous. On that day he made a report to the Peoria County Court as such guardian, showing that he had in his hands the sum of \$1,941.41, belonging to his wards; that at the same time he tendered his resignation as such guardian and it was accepted, and John C. Yates, appellee, was appointed as his successor; that he then stated to appellee that as soon as his appointment was completed he would pay the amount due his said wards over to him. Afterward, on the 7th day of August, 1885, the appellee came to

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appellant's office and told him that he, appellee, had filed his bond in the County Court and qualified as such guardian, and exhibited to the appellant a written order signed by the County Judge accepting the appellant's resignation and appointing the appellee as his successor, and the said appellee at the same time handed a receipt to him signed by himself as succeeding guardian, and relying on the truth of the statements of the appellee and the order and the receipt so handed him, he paid over to said appellee the said amount of money. The order of the County Judge and the receipt of appellee were introduced in evidence and are as follows:

"COUNTY COURT, PEORIA Co., ILL. }
"July Term, 1885. }

"In the matter of the guardian of Jennie Watrous et al.

"This day this cause coming to be heard on the resignation of W. M. Dodge, guardian of Jennie and Ida Watrous, and the court having heard the evidence in the premises, doth order and adjudge and decree that the resignation of W. M. Dodge be and the same is hereby accepted, and that John C. Yates be appointed guardian of said wards and that W. M. Dodge be discharged as such guardian.

"LAWRENCE W. JAMES, Judge."

The receipt is as follows:

"PEORIA, August 7, 1885.

"Received of Wm. M. Dodge, former guardian of Jennie and Ida Watrous, the sum of nineteen hundred and forty-one, 41-100 dollars (\$1,941.41) in full of amount due said wards as per report filed in County Court, Peoria Co., Ill., Aug. 7, 1885.

"JOHN C. YATES,

"Succeeding guardian."

Appellant swears he would not have paid over said money if it had not been for the false representations made by appellee.

Appellee never filed any guardian's bond or qualified as guardian for the said minors and no letters of guardianship were ever issued to him.

Soon after the commencement of this suit appellee absconded and fled to Canada.

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The suit was commenced Nov. 6, 1885, and the affidavit charges as grounds for attachment, "that said Yates obtained the said amount from the plaintiff by falsely and fraudulently representing that he, the said Yates, was the legally appointed guardian of Jennie and Ida Watrous, minor heirs of Samuel Watrous, deceased, and thereby induced the plaintiff to pay over to him the said sum of \$1,900 belonging to said wards; that the said false and fraudulent representations were made in writing, signed by the said John C. Yates. Upon the affidavit appellee joined issue. The parties waived a jury and the cause was tried by the court, and upon hearing the court found the main issues in favor of appellant and rendered judgment in his favor for \$1,923.84, but on the attachment issue in favor of appellee and against appellant, and rendered judgment for the costs on the attachment against appellant, and from this finding and judgment appellant appeals to this court.

The attachment is based on the 9th clause of Sec. 1 of Attachment Act, which provides as follows: "Where the debt sued for was fraudulently contracted on the part of the debtor: *Provided*, the statements of the debtor, his agent or attorney which constitute the fraud, shall have been reduced to writing and his signature attached thereto."

There can be no question but that the debt was fraudulently contracted on the part of appellee, and by reason thereof the first clause of said attachment provision was fulfilled. The only question remaining is whether the last clause of said act has been fulfilled, or, in other words, was there a sufficient reducing of the statement of the debtor to writing? Is the receipt above set out a sufficient compliance with the proviso of the statute?

We think the writing of the statements sufficient. The statements in writing need not contain everything that is said, nor all the devices that may be used to complete the fraud, and need not be reduced to writing *for the purpose* of furnishing evidence of the fraud. It is enough if the writing contain the substance in general of the statements which constituted the fraud. If the fraud is consummated and the writing is given at the time, after the verbal statements which

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induced the fraud are made, it will be sufficient, even if the debtor had no intention at the time of furnishing evidence against himself. If the oral testimony shows the fraudulent design and negatives the statement of the facts stated in the writing, and the written facts are reasonably clear statements of the substance of the misrepresentations, then the writing is sufficient, under the statute. The above receipt shows that appellant was represented as the former guardian of Jennie and Ida Watrous, and that he had legally ceased to be such, and that appellee was then the legally constituted and qualified guardian; that he was in fact the successor, and thus he signs himself, the succeeding guardian. We think the offering of the receipt, executed as it was, clearly implied that he was then the legally appointed guardian. The order signed by the County Judge was only proof produced by appellee that his statement that he was duly appointed guardian by the County Court was true, and to induce belief. It was only collateral facts to induce credence in the mind of appellant that his false and fraudulent statement that he had been duly appointed was true. He stated such was the fact, and proceeded by documents to substantiate it. Nevertheless the appellant, having full confidence in the integrity of appellee, may not have required this evidence, but have been willing to pay the money over on the bare statement of appellee that he was duly qualified. Appellant knew that he had tendered his resignation, and all that remained for appellee to do was to file his guardian's bond, which he had no doubt of his ability or intention to do, and his bare word may have been all that was required. That appellee was the guardian was the only part of the statement that need have been reduced to writing. The due qualification of appellee as guardian was *the essential fact*.

The statements required by statute may be made by way of recital, or giving a receipt, as well as by direct averments.

The statute was one intended to prevent fraud and must be liberally construed, and the courts should give it a reasonable construction in order to attain that end.

The Attachment Act itself provides that it shall be con-

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strued in all courts “in the most liberal manner for the detection of fraud.”

We are therefore of the opinion that the error assigned is well taken, and that the court below should have also found the attachment issue in favor of appellant as well as the other one.

The judgment of the court below is therefore reversed and the cause remanded.

Reversed and remanded.

LEVI MEIERS
V.
ALEXANDER PINOVER ET AL.

Action on Third of Series of Notes—Former Adjudication—Record as Evidence—Estoppel by Verdict—Partnership of Makers—Evidence—Admissions—Instructions.

1. A fact which has been directly tried and decided by a court of competent jurisdiction can not be contested again between the same parties in the same or any other court.

2. In an action upon the third of three promissory notes, given at the same time for the same consideration and as parts of the same transaction, it is *held*: That the record of a former suit on the other notes is admissible and conclusive of the question of the partnership of the makers, that question having been directly in issue in said suit; that the fact of the existence of the partnership being thus established, certain admissions by one of the partners that the transaction in question was a partnership matter, were properly admitted in evidence; and that there was no error in the instructions.

[Opinion filed December 11, 1886.]

APPEAL from the Circuit Court of Peoria County; the Hon. T. M. SHAW, Judge, presiding.

Messrs. ISAAC C. EDWARDS and I. M. HORNBACKER, for appellant.

The record of the former trial only settled the matters in

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issue in that particular case. The findings in that case are immaterial so far as this case is concerned, and are not conclusive on either party in any subsequent suits embracing a different subject-matter as does this case. An estoppel must be conclusive as to both parties and not to one of the parties only. *Clark v. Summons*, 12 Iowa, 368; *Towns v. Nims*, 5 N. H. 259; *Bernard v. City of Hoboken*, 27 N. J. 412.

There is no rule of practice more firmly established than that to form a bar the former recovery must be for the identical same cause of action. *Miller v. McMannis*, 57 Ill. 127; *Merrin v. Lewis*, 90 Ill. 505; *Crabtree v. Welles*, 19 Ill. 55.

Messrs. McCULLOCH & McCULLOCH, for appellees.

It is a rule of universal application that where a controverted question of fact, material to the issue, has been settled by a verdict of a jury and followed by the judgment of the court, and the same question again comes in controversy between the same parties in another suit, the former verdict and judgment will operate as conclusive evidence upon the same question of fact when the second suit comes to be tried.

A very few out of the multitude of cases that might be cited will be referred to. *Sheldon v. Patterson*, 55 Ill. 507; *Gardner v. Buckbee*, 3 Cow. 120; *Edgell v. Sigerson*, 26 Mo. 583; *Hopkins v. Lee*, 6 Wheat. 109; *Hauley v. Foley*, 18 B. Mon. 519; *Henderson v. Henderson*, 3 Hare, 115; *Beloit v. Morgan*, 7 Wall. 619; *French v. Howard*, 14 Ind. 455; *Greenleaf on Evidence*, Sec. 528.

There is no escape from this rule in the present case. Before plaintiffs could recover in the former case they were bound to prove the partnership and the execution of the notes sued on as a firm note.

WELCH, J. This was an action of assumpsit brought by the appellees against the appellant, Levi Meiers, and Gabriel Meiers, on a promissory note September 17, 1882, for the sum of \$269, payable five months after date to appel-

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lees, and signed, Meiers & Co. There was no service on Gabriel Meiers. The appellant, Levi Meiers, filed three pleas—the general issue, a special plea under oath denying joint liability and partnership with Gabriel Meiers, also a plea of *non est factum*, verified by affidavit. On the trial the appellee Alexander Pinover, testified:

I am a manufacturer and jeweler and reside at 450 East 118th street, New York. I have known the co-plaintiffs for about fifteen years; have known the defendants since September, 1882. I am one of the plaintiffs and a member of the firm of A. Pinover & Co. The firm of Meiers & Co. is composed of Gabriel Meiers and Levi Meiers, his father. My firm had in September, 1882, dealings with Meiers & Co. I entered the place of business of defendants in Peoria, Illinois, and found both Gabriel and Levi Meiers. I stated that I would like to show them some goods. After some conversation that I do not recollect, Gabriel said he would look at them. He and his father, Levi, examined and picked out a number of articles of jewelry of the value of \$807.

After selecting these articles Gabriel asked me what were the terms upon which they could buy them. I replied, on an average of four months; and I would take notes for three, four and five months. He replied they would take the goods and give the notes. Before delivering the goods or making out the bill, I asked who the firm was composed of. Gabriel replied that the firm of Meiers & Co. was composed of himself and Levi Meiers, his father. This was said in the presence and hearing of Levi Meiers, but he said nothing. I then delivered the merchandise and a bill for the same. The notes were not then delivered. They were dated about a week after the sale.

The sale was made in the store of Meiers & Co., in Peoria. It was made to both of the defendants. Both Gabriel and Levi Meiers selected the goods, and both examined them before the purchase. A young man by the name of Eppenstein was in the store a portion of the time. The part taken by Levi Meiers was to examine the goods and to express his opinion upon them. The account was settled by taking their

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notes, payable at three, four and five months, and dated about a week afterward.

The notes were sent to A. Pinover & Co., New York, through the mail. I have had no conversation with Levi Meiers in relation to the notes since they were given.

After the maturity of the first two notes and before the maturity of the one involved in this suit, appellees brought suit against appellant and Gabriel Meiers upon the two notes then matured. Gabriel suffered judgment to go against him by default, but appellant interposed the same pleas thereto that he does in this suit. Upon a trial by jury of the issues in that suit they were found for the appellees. The record in the former suit was offered in evidence in this suit and admitted in evidence over the objections of the appellant. The ground of the objection as stated is that the record of the former trial only settled the matters in issue in that particular case and that the findings in that case are immaterial so far as this case is concerned, and are not conclusive on either party in any subsequent suits embracing a different subject-matter as is claimed this suit does. We are referred to the cases of *Crabtree v. Welles*, 19 Ill. 55; *Miller et al. v. McMannis*, 57 Ill. 126, and *Merrin v. Lewis*, 90 Ill. 505. These cases announce the rule that to form a bar the former recovery must be for the identical same cause of action. This case is not one involving the question of estoppel by judgment upon the same cause of action. It is a suit upon a different cause of action wherein the issues are precisely the same as in a former suit. The authorities have no application to the question of estoppel as claimed in this case. The question of the partnership was directly put in issue in that case as it is in this. If the note in this suit was given at the same time for the same consideration and as a part of the same transaction with those sued on in the former case, the verdict and judgment in that case were conclusive evidence of the existence of the partnership between appellant and Gabriel Meiers. As said in the case of *Hanly v. Foley*, 18 B. Mon. 519, "It is a well established rule of law sanctioned as well by policy as precedent, that every material fact involved in an issue must be regarded as

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determined by the final judgment in the action and can not be questioned in any subsequent proceeding between the same parties. In *Hopkins v. Lee*, 6 Wheat. 109, Justice Livingston said: "It is not denied as a general rule that a fact which has been directly tried and decided by a court of competent jurisdiction can not be contested again between the same parties in the same or any other court. Hence a verdict or judgment of a court of record or a decree in chancery, although not binding on strangers, puts an end to all further controversy concerning the points thus decided between the parties to such suit. In this there is and ought to be no difference between a verdict and judgment in a court of common law and a decree in a court of chancery. The same rule is announced in *Bigelow on Estoppel*, 30 *et seq.*; *Sheldon et al. v. Patterson*, 55 Ill. 507; *Gardner v. Buckbin*, 3 Cow. 120; *Edgell v. Sigerean*, 26 Mo. 580; *Edwards v. Stewart*, 15 Barb. 67; *Beloit v. Morgan*, 7 Wall. 619; *French v. Howard*, 14 Ind. 455. The distinction between the estoppel in this case and the estoppel in the cases referred to by the appellant *supra*, is well stated in the case of *Hanna et al. v. Reed et al.*, 102 Ill. 597. "When the former adjudication is relied on as an answer and bar to the whole cause of action, or in other words when it is claimed to be an answer to all the questions involved in the subsequent action, then it must appear that the cause of action and thing sought to be recovered are the same in both suits. The former adjudication in such case is known as an estoppel by judgment and the judgment itself is a bar to the action. But when some specific fact or question has been adjudicated and determined in a former suit and the same fact or question is again put in issue in a subsequent suit between the same parties, its determination in the former suit, if properly presented and relied on, will be held conclusive upon the parties in the latter suit without regard to whether the cause of action is the same in both suits or not. This is known as an estoppel by verdict and is equally available to a plaintiff in support of his action when the circumstances warrant it, as it is by a defendant as a matter of defense." The same rule is announced in *Tilley v. Bridges*, 105 Ill. 336. It is, however, insisted by the counsel for the appel-

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lant that as the record of the former adjudication was not specially replied to the plea denying the partnership, that the record in that case is not conclusive but only *prima facie* evidence. We think this point not well taken. The Supreme Court of this State, while not clearly deciding the question, seems strongly to incline against the position assumed by the counsel for the appellant on this point. *Gray v. Gillilan*, 15 Ill. 453; *Sheldon v. Patterson*, 55 Ill. 507; *Greenleaf on Evidence*, Sec. 528; *Lawrence v. Hunt*, 10 Wend. 81.

It is further insisted the court erred in admitting the evidence of Ulrich as to what Gabriel Meiers had told him as to who signed the note and what the consideration was for it. The notes in the former suit and the note in this suit all bear date on the same day. The evidence of Pinover was that there was only one sale of goods, and that the notes were received a few days thereafter corresponding in the aggregate to the exact amount of the sale. The judgment in the former suit established the fact of the existence of the partnership on the day of the date of the note in suit. Appellant admitted on the trial that the note sued on had been executed by Gabriel Meiers. Under this evidence we hold that the evidence was properly admitted. *Greenleaf on Evidence*, Vol. 1, Sec. 112; *Hitt v. Allen*, 13 Ill. 592; *C. & R. I. R. R. Co. v. Collins*, 56 Ill. 212. The cases of *Smith v. Hulett*, 65 Ill. 495, and *Bishop v. Georgeson*, 60 Ill. 485, are not in point. There the declaration of one partner had been admitted against the absent partner as to the existence of the partnership. Here this class of evidence was excluded. The evidence of the partnership was conclusively proven by the record in the former suit. And all the appellees had to do was to identify the cause of action sued on as one of the series of notes given for the diamonds sold by the appellees to the firm of Meiers & Co. Even if this evidence had been improperly admitted it worked no injury to the appellant for the reason above stated.

It is also insisted that the court erred in giving certain instructions for the appellees and in refusing to give certain instructions for the appellant and in modifying others of his.

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The instructions given were in harmony with the view we have taken of the case and were properly given. The modifications made to the appellant's instructions were proper and necessary and the 5th instruction asked by appellant was properly refused. The question of the partnership had been fully presented in other instructions given. We are of the opinion that there was no error in admitting the evidence or in the instructions. The verdict of the jury is sustained by a preponderance of the evidence.

Judgment affirmed.

FREDERICK P. KOEHLER AND MARGARETTA KOEHLER

V.

RUTH MILLER, ADMINISTRATRIX.

Action for Damages for Personal Injuries from Falling Wall—Liability of Wife—Estate Jure Uxoris—Act of 1861—Evidence—Instructions.

1. Prior to April 24, 1861, when the Married Women's Act of 1861 took effect, the husband was seized of a life estate in the equitable and legal estate of his wife, and said act did not affect such life estate where it had previously vested.

2. A husband in possession and control of his wife's estate under his said common-law right, is presumed to act for himself and not as her agent in the erection of a wall thereon; and she is not liable for injuries resulting from his negligence in the erection of said wall.

3. In the case presented it is held that statements made by the husband in the absence of the wife were improperly admitted.

4. An instruction should not single out and call special attention to a circumstance in evidence which is inconclusive in character.

[Opinion filed December 11, 1886.]

APPEAL from the Circuit Court of Stephenson County; the Hon. JOHN V. EUSTACE, Judge, presiding.

Messrs. BARTON & BARNUM and H. C. HYDE, for appellants.

Mr. J. A. CRAIN, for appellee.

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WELCH, J. This was a suit in trespass on the case brought by the appellee against the appellants to recover damages against the appellants for causing the death of her husband Francis O. Miller, as is claimed by their negligence. On the 16th day of October, 1880, during a violent wind a part of the front brick wall of a building on Stephenson Street in the city of Freeport, Illinois, was blown down upon and killed appellee's husband. Some of the counts allege that the appellants so negligently, carelessly and defectively erected, constructed and built the house that by reason thereof it fell and killed her husband. And other of the counts allege that the appellants were possessed of the building and negligently suffered and kept it in bad repair and while in such condition it fell and killed her husband.

Two principal questions arise in this case; first, whether the wall was properly constructed and was kept in repair; second, is the appellant, Margaretta Koehler, the wife of appellant, Frederick P. Koehler, jointly liable with her husband for the injury? On the first point the evidence was voluminous and conflicting and the jury having decided for appellee, if that were the only question in the case we would not be inclined to disturb the findings. Second, is the appellant, Margaretta Koehler, the wife of Frederick P. Koehler, jointly liable for the injury? They had been married some forty years and had a son thirty-nine years of age. The premises were conveyed by deed to Frederick P. Koehler on the 24th day of March, 1853, at which time he and his family took possession thereof and continued to occupy it until 1863. There was an old building on the premises when he took possession which was occupied as his family residence. After the appellant, Frederick P. Koehler, and family, left the premises, it was occupied by tenants and was so occupied at the time of the injury. The wall that fell and caused the injury was built at his request in 1877, and was paid for by him. There was a deed made by the appellant, Frederick P. Koehler, of these premises, to John Wurth, of date December 6, 1858. Also a deed from John Wurth and wife to Henry Boyer of date April 10, 1861, and a deed from Boyer and wife to the appellant, Margaretta Koeh-

ler of date July 16, 1881. This conveyance to her was long after the injury complained of. It is however insisted that Boyer being her brother and deeding to her for the nominal consideration of one dollar, property worth several thousand dollars, showed that he was a mere trustee and held the title for her, the premises being controlled by her co-appellant and husband as her agent. A conclusive answer to this claim is found in the fact that the deed to Boyer was dated April 10, 1861, and his holding as trustee would be of that date, the equitable title vesting in her of that date. The married women's law did not take effect until April 24, 1861. The husband by the common law became seized, April 10, 1861, of a freehold estate for life *jure uxoris* in the premises and was entitled to the possession, rents, profits, etc. 2 Kent's Com., 130; Kibbe v. Williams, 58 Ill. 30. The statute of April 24, 1861, did not divest him of this right there being nothing to show that his marital rights were excluded by the deed. The estate *jure uxoris*, attached to the equitable as well as the legal estate of his wife. 1 Washburn on Real Prop., 277; Tyler on Infancy and Coverture, Sec. 286. This being so the acts of her co-appellant and husband in constructing the wall and controlling the building would be referable to his possession and absolute control of the premises given him by the law as the holder of the life estate and not to any presumed agency for his wife. This latter would be the law only as to lands held by the statute—that vested in her after April 24, 1861. The sixth instruction given for appellee by the court was otherwise. This instruction told the jury that if Margaretta Koehler owned the premises at the time of the erection of the wall and the wall was erected by her husband, then her said husband may be presumed to have been acting as the agent of his said wife, and she is to be held responsible, etc. The eighth instruction for the appellee was erroneous. It singled out one circumstance in proof of an inconclusive character and called special attention to that, giving undue prominence to it. Garretson v. Pegg, 64 Ill. 111; Guardian M. L. Ins. Co. v. Hogan, 80 Ill. 35.

It was also error to permit Harris to testify to what Koehler

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said in the absence of his wife, *i. e.*, that Mr. Koehler said in Smith's office that when Mrs Koehler came down town she would come up and sign the lease. For the errors herein indicated the judgment is reversed, cause remanded and *venire de novo* awarded.

Reversed and remanded.

BELA M. STODDARD ET AL.

V.

DAVID FILGUR ET AL.

Dominant and Servient Estates—Drainage—Open Ditch—Right to Fill—Injunction—Parol License—Revocation—Review of Authorities.

1. The owner of a dominant estate can not by any act of his own acquire the right to collect the surface water upon his land by artificial channels and thus flood his neighbor's land without his consent or at least acquiescence.

2. When a person makes an artificial ditch upon his own land for his own accommodation, he is not obliged to keep it open as an artificial drain for the purpose of draining the lands of others.

3. A parol license to turn water, which has been artificially collected, into a ditch upon the land of another, is valid and revocable.

4. In the case presented, it is held that the owner of the dominant estate is not entitled to an injunction to prevent the filling up of an open ditch on the servient estate.

[Opinion filed December 11, 1886.]

APPEAL from the Circurt Court of Woodford County; the
Hon. S. S. PAGE, Judge, presiding.

Mr. M. L. NEWELL, for appellant.

“The expenditure of money or labor by one man on the land of another, under a license given by the owner, will estop the owner from revoking the license and wresting the former from his possession of the land. Where the licensee has expended money on the faith of the license, and put himself in

a position that he would be seriously damaged by allowing it to be revoked, the estoppel is applied in the same manner as it is to those cases of acquiescence and silent consent. A parol license, when executed, may become an easement on the land, and where acts have been done in reliance upon a license, the licensor will be estopped from revoking it to the injury of the licensee. This rule, that a license to do something on a licensor's land, followed by expenditure on the faith thereof, is irrevocable, rests upon the principle of estoppel because the parties can not be placed in *statu quo*. Equity treats a license thus executed as a contract giving an absolute right. A license can not be revoked or withdrawn as long as it is essential to the possession or enjoyment of a vested right or interest which has been created by the licensor, placed with his assent where the continuance of the license is essential to its enjoyment. This is a branch of the rule that no one can withdraw a promise or declaration made with a view of inducing others to act after they have acted upon it, and thus placed themselves in a position where they must necessarily suffer if it be withdrawn." Herman on Estoppels, 439, citing Dyer v. Cannall, 4 Penn. 353; Bridge Co. v. Bragg, 11 N. H. 702; Rhodes v. Otis, 33 Ala. 578; Dark v. Johnson, 56 Penn. 164; Huff v. McAuley, 53 Penn. 206.

This doctrine is substantially adopted in Iowa and Indiana. Wickersham v. Orr, 9 Iowa, 260; 1 Washburn on Real Estate, 549; Russell v. Hubbard, 59 Ill. 335. "The law is solicitous to prevent all kinds of imposition and injury from confidence reposed in the acts of others; and a parol license to do an act on one's own land, affecting, injuriously, the air and light of a neighbor's house, is held not to be revocable by such neighbor after it has been once acted upon and expense incurred. Such a license is a direct encouragement to expend money, and it would be against conscience to revoke it as soon as the expenditure begins to be beneficial. The contract would be specifically enforced in equity. Such a parol license, to enjoy a beneficial privilege, is not an interest in the lands within the Statute of Frauds." 3 Kent's Com. 453; 1 Washburn on Real Estate, Book 1, Chap. 12, Sec. 13.

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"It matters not whether the license is granted by deed or by parol; as a mere license, it is always revocable at the will of the licensor; but when coupled with an interest in land and executed, it is irrevocable, and this constitutes the distinction between revocable and irrevocable licenses." *Woodward v. Seeley*, 11 Ill. 157.

Mr. C. H. CHERRY, for appellees.

It seems clear from the evidence of both Filgur and Stoddard, that Stoddard never was authorized to open or keep open that ditch. And even if he had been, such license or authority giving such right is within the Statute of Frauds and void. Such a license is revocable at any time, even though the licensee may have incurred expenditures of money upon the faith of such license. *St. Louis Nat. Stock Yards v. Wiggins Ferry Co.*, 112 Ill. 384; *Woodward v. Seely*, 11 Ill. 157; *Tanner v. Volentine*, 75 Ill. 624; *Forbes v. Balenseifer*, 74 Ill. 183; *Mumford v. Whitney*, 15 Wend. 380; *Cook v. Stearns*, 11 Mass. 533; *Dodge v. McClintock*, 47 N. H. 386; *Houston v. Laffee*, 46 N. H. 505; 2 Am. Lead. Cases (5th Ed.), 557-560; *Babcock v. Utter*, 32 How. 439.

The rule governing the rights of the owners of upper and lower adjoining lands in this State, as to what each of them may do upon his own land affecting the flowing of surface water, has been fully settled by the following decisions: *Gilham v. Madison Co. R. R. Co.*, 49 Ill. 484; *Gormly v. Sanford*, 52 Ill. 158; *Mellor v. Pilgrim*, 3 Ill. App. 476; S. C., 7 Ill. App. 306; *Hicks v. Silliman*, 93 Ill. 255; *Herrington v. Peck*, 11 Ill. App. 62; *Peck v. Herrington*, 109 Ill. 611. See also *White v. Chapin*, 12 Allen, 516; *Smith v. Miller*, 11 Gray, 145; *Dickinson v. City of Worcester*, 7 Allen, 19; *Tryer v. Warne*, 29 Wis. 511; *Goodale v. Tuttle*, 29 N. Y. 466; *Miser v. Caldwell*, 7 Nev. 363; *Kauffman v. Grieseman*, 26 Pa. 26; *Miller v. Laubach*, 47 Pa. 154; *Livingston v. McDonald*, 21 Iowa, 160.

WELCH, J. This was a bill filed by appellants against the appellees to enjoin them from filling up an open ditch dug on the lands of the appellee Filgur. A temporary injunction

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was granted which, upon the hearing, the court dissolved and dismissed the bill, from which order this appeal is taken. The evidence shows that the appellant, Bela M. Stoddard, is the owner of the southeast quarter of section two in Minonk Township, Woodford County, and that the appellee, David Filgur, is the owner of the southwest quarter of said section. That Stoddard was the owner of the dominant and Filgur of the servient estate. That the surface water from a large part of Stoddard's land flowed entirely to and over Filgur's land. The water flowed over the surface among the grass and other vegetation in slight depressions of the surface of the ground, ranging from three or four to several rods in width. Filgur, in 1875, dug an open ditch on his own land, a distance of sixty-seven rods. The ditch was six feet in width at the top, two feet at the bottom, and three and one-half feet in depth. Stoddard, in 1882, constructed from fifteen to twenty tile drains, running from various portions of his land, all connected with and bringing their water together into a ten-inch tile drain, which discharged its waters into the open ditch two and one-half feet below the natural surface of the ground. Filgur, in 1885, had constructed two tile drains, one on each side of this open ditch, and was proceeding to fill up this open ditch level with the surface of the ground, when this bill was filed to enjoin him from filling it up. The legal questions presented for our consideration by this record are: 1st. What are the relative rights of the owners of the dominant and servient estate? 2d. What if any right can the owner of the dominant acquire in the servient estate under a parol license? We shall consider the questions in the order stated.

The rule announced by the Appellate and Supreme Courts of this State as to the relative rights of the owner of the dominant and servient estate, is clearly and tersely stated by Pillsbury, P. J., in *Mellor v. Pilgrim*, 3 Ill. App. 476. "The owner of a superior heritage can not by any act of his acquire the right to collect the surface water upon his own land by artificial channels, and thus flood his neighbor's land, without his consent. He can not impose upon the land of an adjoining proprietor without his assent, or at least acquiescence,

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the additional burden of having the surface water converted into a stream when it is discharged upon his land. He is not obliged to accept it to his injury, in larger quantities or at different times than he otherwise would, but for the voluntary act of his neighbor." In *Gormley v. Sandford*, 52 Ill. 158, the rule is announced, when a person makes artificial ditches upon his own land for his own accommodation, he has a perfect right to fill them up to the natural surface when they are dug, and that he is not obliged to open or keep open artificial drains for the purpose of draining the lands of others. *Gilham v. Madison Co. R. R. Co.*, 49 Ill. 484; *Hicks v. Silliman*, 93 Ill. 255; *Peck v. Harrington*, 109 Ill. 611. Tested by the rule announced *supra*, the appellants had no right to an injunction.

It is, however, insisted by the counsel for appellants that they had a license to drain into the ditch, from Filgur. Assuming that appellants had a parol license to drain into this ditch, what right did they acquire to the use of this ditch by virtue of the license? In *Woodward et al. v. Seely et al.*, 11 Ill. 157, Trumbull, J., said: "What then is a license? Simply to do something which, without such permission, would have been unlawful. It matters not whether granted by deed or parol; as a mere license it is always revocable at the will of the licensor, but when coupled with an interest and executed, it is irrevocable, and this constitutes the distinction between revocable and irrevocable licenses."

When the license is coupled with an interest in land, or of such a character that the interest could not pass by parol, then a writing is essential to the creation of the interest, otherwise no interest passes. The license in this case under the rule announced *supra* was revocable. It is, however, insisted that this rule has been modified and we are referred to *Russel v. Hubbard*, 59 Ill. 335, *Kamphouse v. Gaffner*, 73 Ill. 453, and *Forbes v. Balenseifer*, 74 Ill. 183. In the case of *Russel v. Hubbard*, 59 Ill. 335, where the owner of a lot of ground contemplating the erection of a frame building thereon, the owner of a brick house situated on the line of an adjacent lot proposed to him, if he would build of brick, he might use the

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brick wall of his house for the purpose of attaching thereto the proposed new building. The proposition was accepted, and the new house was built of brick and attached to the wall of the other building. It was held that, while the license to use and attach to the wall might have been revoked prior to the execution of the purpose of the license, yet, after its execution by the expenditure of money in the erection of the new building as induced by the permission, the license was irrevocable. This case as held in 73 Ill. *supra*, was held to be limited to cases of party walls. We do not understand the *dictum* announced in the cases in 73 and 74 Ill. *supra*, to be in conflict with the rule announced in 11 Ill. *supra*, where the rule announced in "Gale and Whately's Law of Easements" was approved, "that a man may in some cases by parol license, relinquish a right which he has acquired in addition to the ordinary rights of property, and thus restore his own and his neighbor's property to their original and natural condition; but he can not by such means impose any burden upon lands, in derogation of such ordinary rights of property. As for instance, a parol license will be valid for building a wall in front of his ancient windows, while a similar permission to turn a spout on his land from a neighboring house, will be invalid and revocable." The rule as announced is approved in *Tanner v. Volentine*, 75 Ill. 624, and in *National Stock Yards v. Wiggins Ferry Co.*, 112 Ill. 384, where it is said the case of *Russel v. Hubbard* seems somewhat at variance with the case of *Woodward v. Seely*, but does not propose to overrule or question it. In *Kamphouse v. Gaffner*, 73 Ill. 453, we said *Russel v. Hubbard* must either be considered as limited to party walls or be considered as overruled, and in *Forbes v. Balenseifer*, 74 Ill. 183, it is rather intimated that *Russel v. Hubbard* is to be limited to the facts of that case. *Woodward v. Seely* has never been overruled or directly questioned by this court that we are aware of, and we think it must govern this case. What was said in the case of *Woodward v. Seely*, *supra*, may with equal propriety be said of this case: "Tested by the law as here stated the license in this case was clearly invalid as it did impose a burden upon the land of defendants in der-

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ogation of what ordinarily belonged to it, and there can be no difference whether water is turned upon the land of another by means of a spout or mill-dam." "Nor can the complainants call upon a court of equity to enforce the license upon the grounds that they have made valuable improvements and expended their money relying in good faith upon it;" "before acting so imprudently, they should have acquired permission by deed to overflow the land of the defendants." We do not understand the rule announced in *Morse v. Copeland*, 2 Gray, 302, to be in conflict with the rule announced by the Supreme Court of this State, but if it is, it would not be binding on us. The question in this State is no longer an open one. It is *stare decisis*. There was no error in dissolving the injunction and dismissing the bill.

Decree affirmed.

WILLIAM MCFARLANE

V.

JOHN PIERSON.

Landlord and Tenant—Abandonment—Action to Recover for Work and Labor Performed—Claim of Eviction, not Sustained—Refusal of Landlord to Make Repairs—Remedies of Tenant.

1. Where the landlord in violation of his covenant fails to make repairs, the tenant may make them himself, charging the expense against the landlord, or sue for damages for breach of covenant.

2. In an action by a tenant against the landlord to recover for work and labor performed by him on the demised premises, after an alleged eviction, it is *held*: That the failure of the landlord to furnish material for repairs did not amount to an eviction; that certain evidence touching such failure was improperly admitted; that this error was cured by subsequently excluding said evidence; that the evidence does not show such misconduct on the part of the landlord toward the servants of the tenant, nor such action touching the matter of his boarding as to amount to an eviction; and that certain instructions were erroneous, one of which is particularly objectionable because unsupported by any evidence presented.

[Opinion filed December 11, 1886.]

McFarlane v. Pierson.

APPEAL from the Circuit Court of Will County; the Hon. DORRENCE DIBELL, Judge, presiding.

Messrs. FLANDERS & SHUTTS, for appellant.

Mr. J. W. D'ARCY, for appellee.

It is well settled that where a tenant is evicted by the landlord, he is released from the payment of rent. Wood's Landlord and Tenant, 793; Taylor's Landlord and Tenant, Sec. 379; Smith v. Wise, 58 Ill. 141; Leopold v. Judson, 75 Ill. 536; Haynor v. Smith, 63 Ill. 430.

An eviction may be produced by any act of the landlord or any person acting under his authority, which deprives the tenant of the beneficial enjoyment of the premises. Wood's Landlord and Tenant, 793.

In order to produce an eviction it is not necessary there should be an actual physical expulsion, for the landlord may do many acts tending to diminish the enjoyment of the premises, which will amount to an eviction and exonerate the tenant, if he quits possession, from the payment of rent. Taylor's Landlord and Tenant, Sec. 380, Note 1; Cohen v. Dupont, 1 Sandf. 260.

"Whether the acts complained of amount to an eviction depends upon the circumstances, and is a question in all cases for the jury." Haynor v. Smith, 63 Ill. 430; Lynch v. Baldwin, 69 Ill. 210.

LACEY, J. Appellee sued appellant before a Justice of the Peace on account and recovered judgment for \$125, whereupon appellant took an appeal in the case to the Circuit Court where the cause was again tried by a jury and verdict rendered in appellee's favor for \$180, upon which verdict judgment was rendered and appeal taken to this court.

It appears from the evidence that appellant, the lessor, leased to appellee a certain farm in Jackson Township in the County of Will by lease in writing bearing date March 3, 1885.

The lease provided that appellee was to have the west room

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and equal rights of kitchen and upstairs of the house on the premises and also to have orchard and one-third of the apples and half the dried apples. Lease was to continue from the 1st March, 1885, to 1st March, 1886. The appellee was to pay for the use thereof as follows: Two-thirds of all the corn, oats and potatoes, hay and hogs grown on the said devised premises—corn to be in crib, oats in bin, and hay stacked in yard. Appellee was to keep up the fences, and also furnish the material. This latter provision was probably a mistake in drawing up the lease. It was no doubt to be appellant who was to furnish the material. Appellee was to have ten or fifteen cows to milk and the butter was to be equally divided between both parties. Appellee was to have six sows and the pigs were to be divided as above.

Appellant was to furnish teams, tools, feed and seed necessary to work the farm, with several other provisions not necessary to mention, and the women were to do the cooking, washing and mending for the family and to clean rooms at the rate of \$50 per year, and if the appellant had any men to work he was to pay at the rate of 50 cents per week, etc.

The appellee removed on the place and proceeded to fulfill his part of the covenants in the lease on the 5th of March, 1885. Appellant lived in part of the same house with his two sons, one about twenty and the other about eight years old, and appellee's wife proceeded to cook for them and do the work generally, as the lease provided. Appellant furnished his own provisions. After about two months and after doing plowing and considerable work under the lease, appellee became dissatisfied and abandoned the premises and refused further to perform his covenants in the lease.

It is insisted that appellee was evicted by the wrongful acts of the appellant and was excused from the further performance of his covenants, and that he may, as he did do in the court below, recover for the work and labor performed on the premises by him as for work and labor performed. On the other hand the appellant contends that the appellee abandoned the leased premises without legal excuse and that he has no right to recover for anything he may have done under the lease.

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This was the only issue tried before the court below and the alleged errors of the court and jury arising on that hearing we are called on to review here. There was evidence admitted by the court but afterward excluded, going to show that that portion of the lease which required the appellee to furnish the material to repair the fence was a mistake and that the actual agreement was that appellant should furnish such material.

This testimony was admitted at first on the idea that in case appellant was obliged to furnish the materials and failed to do so, *that* justified appellee in throwing up the lease and abandoning the premises, in fact, that such failure amounted to an eviction.

It was undoubtedly error on the part of the court to admit such evidence. In case a landlord in violation of his covenant fails to make repairs the remedy of the tenant is to make repairs himself and charge the expense against the landlord, or else sue on such breach of covenant and recover the damages occasioned thereby. Sedgwick on Damages side page 198; Wood's Landlord and Tenant, Sec. 380, 442. But as far as the error in admitting the evidence was concerned the court cured it by afterward excluding it.

But under the issue in the case before the jury the only question was whether the appellee was evicted. That is, was the conduct of appellant such as to deprive appellee of the full and peaceable enjoyment of the premises? It was wholly immaterial whether a mistake had been made in the lease or whether, conceding that the lease and agreement was that appellant was to furnish the material to fix up the fences, he failed to do so; for the reason that if such failure existed it was no legal ground for abandoning the premises by appellee.

Yet the court gave the appellee's 1st, 2d, 3d, 4th and 6th instructions, which lay down the law obtaining in case of ordinary contracts when, if the one party fails to perform an essential part thereof, the other may also refuse.

The sixth instruction especially would be understood by the jury as holding that in case appellant was to furnish the lumber to build the fence and failed in doing so, the appellee might abandon the premises and sue for his labor. It tells them in

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general terms that if one party is ready and willing to perform a legal contract and partly performs it and is prevented by the other from completing such performance, then such contract may be abandoned, etc., leaving the jury to say what amounted to such prevention without reference to the facts of the case on trial. In regard to the misconduct on the part of the appellant which is claimed amounted to an eviction, it is only necessary to remark that we see no such evidence as would justify appellee in abandoning the premises.

It seems from the evidence that appellee's wife and her hired girls did the housework during nine weeks for appellant and his two boys as well as for her husband and his hired men, for all were living in the house together on the farm. Appellee had one hired girl one and one-half weeks who was the sister of his wife; she quit, and she got another who stayed four weeks; the last girl was only fifteen years old, the first was twenty-seven years old. Mrs. Pierson swears that the first one did not want to stay because appellant objected to her work, and he objected to the second girl because he did not like her. McFarlane and his boys had separate rooms, and she and her girl did the work for both families and the work about the house. Mrs. Pierson had a child born to her about twenty days after she went on the place. She testified that appellant at one time said to her sister: "Wouldn't you like to kiss me?" "Wouldn't you rather kiss me than my son John?"

Appellant testifies that he did not recollect making the proposition to Mrs. Pierson's sister to kiss him but might have done so jokingly. This was all the evidence of any indecent behavior on the part of appellant toward Mrs. Pierson or her girls. It does not appear that any of the ladies took any serious offense at it at the time as the girl did not leave on that account, but because appellant did not like her work. Then after that a second girl was there four weeks and no indecent or improper proposals were made to her by appellant and she left because appellant did not like her work. This is what Mrs. Pierson thinks. It would seem the excuse for abandoning the place on account of indecent conduct of appellant toward the hired girls of appellee, was an afterthought

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not regarded sufficient at the time. That ground for abandonment should be laid out of the question. This girl who was only fifteen years old did cooking in such manner that appellant as he claims had just cause to complain. She would bake up bread enough at one time to last from six to nine days and the bread would become so hard he could scarcely eat it. This is not contradicted. It would appear that he had just ground for complaint. But let that be as it may, the mere fact, and that is all there is of it, that appellant complained of the manner in which his work was done would not amount to an eviction. If his complaints were such that Mrs. Pierson could not satisfy him in regard to the work and they were unjust, she might have refused to board him and have refused to comply with that covenant in the lease. It was not necessary to the enjoyment of the farm that appellee should be permitted to board appellant. If there was any profit in it damages could be recovered by appellee for being refused the privilege, but this would not amount to an eviction. There appears to be no sufficient evidence in this case upon which the jury would be justified in finding that there was an eviction.

The tenth of appellee's instructions submits to the jury the question whether or not the appellant did not "use improper language or make indecent or immodest proposals to appellee's wife," etc.

There is no evidence that anything of the kind, in the remotest degree, ever took place, and it was very improper to submit such question to the jury. It seems that Mrs. Pierson did the work for both families for some time after the last girl left and finally appellee got tired and dissatisfied and abandoned the premises and we think without just cause. The appellant had no intention to deprive the appellee of the full use and enjoyment of the premises and never attempted so to do. *Lynch v. Baldwin*, 69 Ill. 210; *Hoyner et al. v. Smith et al.*, 63 Ill. 430.

For the reasons above indicated the judgment of the court below is reversed and the cause remanded.

Reversed and remanded.

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HENRY R. DANFORTH

V.

HERMAN CLASSEN.

Judicial Officers—How far Protected by Official Character—Justice of Peace—Illegal Commitment to County Jail—Ministerial Acts—Action of Trespass—Evidence—Instructions.

1. The judicial character of a Justice of the Peace only protects him from personal liability when the act complained of is within his jurisdiction.

2. In an action of trespass against a Justice for false imprisonment, it is held: That the warrant, trial and fine of plaintiff for maintaining a nuisance, were regular and within the jurisdiction of the Justice; that the order of commitment, which was in the form of a commitment to bind the defendant over to the County Court, placing no limit upon the imprisonment, was irregular and not justified by the judgment; that the issue of the writ was a ministerial act; that the evidence touching plaintiff's illness and its cause was properly admitted under an amendment to the declaration; and that the instructions, though not strictly accurate, were sufficient.

3. It seems that Sec. 1, Act of April 12, 1879, does not give the Justice the option to designate the place where the offender may be imprisoned, but that said place must be fixed by city or village ordinance.

[Opinion filed December 11, 1886.]

APPEAL from the County Court of Iroquois County; the Hon. S. C. BOVIE, Judge, presiding.

Statement of the case by LACEY, J. The appellee commenced suit in an action of trespass for false imprisonment in the sum of \$5,000. Verdict of guilty and \$500 damages; *remittitur* by appellee of \$200 and judgment for \$300; appeal by the defendant to this court.

There was an ordinance in the Village of Danforth against keeping and maintaining nuisances, keeping offensive privies, pig-stys, etc. The appellee was a resident of the village. On the 13th day of June, 1884, a complaint in writing sworn to, was filed before H. R. Danforth, the appellant, who was a

Justice of the Peace in the said village, against the appellee, charging him with maintaining a nuisance within the corporate limits of said village. Thereupon appellant as such Justice issued a warrant for the arrest of the appellee, directed to any Constable, commanding him to bring the body of the appellee before him forthwith unless the appellee gave bail for his appearance in the full amount of the demand of the village, and if bail be entered on the back of the warrant, then appellee was commanded to appear before him on the 18th day of the same month, at 9 o'clock A. M., to answer certain demands of the village against him, of the nature of a penalty not exceeding \$200, for violation of the ordinance mentioned. This warrant the appellee placed in the hands of Constable G. W. Bailey to execute, and ordered Bailey to arrest appellee. On the same day said Constable arrested the appellee on the said warrant, and he not giving bail was brought before the appellant and arraigned and put on his trial, and after hearing the appellant fined him in the sum of \$25 and costs of suit, and rendered judgment against him for that amount, and upon the appellee refusing payment, an order was entered against him following said judgment order, as follows: "Defendant refusing to pay fine or give bail it is ordered that the said Herman Classen be committed to the county jail until fine and costs be fully paid."

Thereupon appellee refusing to pay said fine and costs or give bail, the appellant issued an order for the commitment of the appellee in the county jail in substance, as follows: It was directed to any Constable of said county, and to the Sheriff or jailor of said county reciting that appellee had that day been examined before the appellant, a Justice of the Peace in the county aforesaid, on a charge of violation of village ordinance preferred against him on the complaint in writing, under oath, of John Overacker, and it appearing probable from the evidence of ——— sworn and examined before him that said appellee was guilty of said charge, to-wit: By keeping an offensive pig-sty, privy and manure pile in violation of Art. 10, Sec. 1, Ordinance No. 15. And the appellee having failed to give bail for his appearance at and on the first day of the

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next term of the County Court as required, we, the people, command you, the said Constable, forthwith to convey said appellee to the common jail of said county, and him deliver to the keeper thereof, and you, the said keeper or jailor, are hereby required to receive into your custody the said appellee and him safely keep until discharged in due process of law; and for so doing this shall be your sufficient warrant. Thereupon the *mittimus* was placed in the hands of the Constable, George W. Bailey, and appellant ordered him to go to Watseka, the county seat, with him and put him in jail. The Constable thereupon took appellee and conveyed him to Watseka, and offered him to the Sheriff, and the Sheriff would not receive him on account of the insufficiency of the writ, and the Constable thereupon discharged the appellee.

The Village of Danforth is about four miles from Gilman, which distance there is no railroad, and from Gilman there is communication to Watseka by rail. The Constable resided in Gilman and appellant when the warrant for arrest was issued took it to Gilman and placed it in the hands of the same Constable with orders to arrest appellee; appellee after he was discharged in Watseka returned on the train to Gilman, and went from there in the night to his home at Danforth on foot. It rained after he got started from Gilman, and when he got home it must have been about 4 o'clock A. M.; appellee as he testified, "took awful sick after that; I caught cold." "It was the weather and excitement of the arrest that made me sick." The cold "lasted over a week, and there was a week he could scarcely do anything." The declaration was at this point in the trial amended so as to admit this testimony. The appellant moved the court to exclude the evidence, but the court refused and allowed the evidence to remain before the jury. The appellant filed special pleas of justification setting up the fact of his being Justice of the Peace and facts of the proceedings, the legal trial, judgment and *mittimus* as a justification.

Messrs. KAY & EUANS, for appellant.

Judges of limited and inferior authority are not liable to a

civil action from any judicial act within their jurisdiction. *Bradley v. Fisher*, 13 Wall. 335; *Randall v. Brigham*, 7 Wall. 523.

When the record shows that the court had jurisdiction of the subject-matter and of the person of the parties, neither the court nor those acting under his authority can be held liable in trespass, although the proceeding may be irregular and erroneous. *Von Kettler v. Johnson*, 57 Ill. 109; *Outlaw v. Davis*, 27 Ill. 465.

If the Justice of the Peace had jurisdiction of the question he is not liable. *Flack v. Ankeny*, Breese, 187; *Lancaster v. Lane*, 19 Ill. 242; *Moak's Underhill on Torts*, 188-194.

Even if the Justice, believing he was bound to do so, had committed the accused to the county jail until he should give bail for his appearance at the next court having jurisdiction, *it was but an error of judgment*, and that having jurisdiction of the person of the plaintiff and of the subject-matter, he was protected from an action for false imprisonment. *Kenner v. Morrison*, 12 Hun, 204; *Rains v. Simpson*, 50 Texas, 495; S. C., 32 Am. Rep. 609.

"I prefer to place the decision on the broad ground that no public officer is responsible in a civil suit for a judicial determination, however erroneous it may be, and however malicious the motive which may have prompted it. Such acts when corrupt, may be punished criminally, but the law will not allow malice and corruption to be charged in a civil suit against such an officer for what he does in the performance of an official duty. The rule extends to the Judges from the highest to the lowest; to jurors, and to all public officers, whatever name they may bear, in the exercise of judicial power." *Weaver v. Devendorf*, 3 Den. 117.

When a Magistrate has jurisdiction over the offense and over the person of the offender, his acts, though ever so erroneous, will not make him a trespasser; and a conviction by him, still subsisting and valid upon its face, on a subject within his jurisdiction, is a legal bar to an action for anything done under such conviction. *Lancaster v. Lane*, 19 Ill. 242. See also, *Little v. Moore*, 1 Southard, 74; S. C., 7 Am. Dec.,

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574; Gregory v. Brown, 4 Bibb. 731; S. C., 7 Am. Dec. 731; Reid v. Hood, 2 Nott & McC. 168; S. C., 10 Am. Dec. 582; Flack v. Harrington, Breese, 213; Adkins v. Brewer, 3 Cow. 206; Bailey v. Wiggins, 5 Harrington, 462; S. C., 60 Am. Dec. 650.

Messrs. DOYLE, MORRIS & PIERSON and PAYSON & RAYMOND, for appellee.

Where an inferior court is guilty of excess of jurisdiction, trespass may be supported for anything done under such proceedings. 58 Ill. 353.

Ignorance of the extent of his power is no excuse for the Magistrate. Thomas v. Hinsdale, 78 Ill. 259.

A tribunal proceeding under limited and special powers decides whether it has jurisdiction or not at its peril, and hence it is that process issues from a court or to the ministerial officer who executes it. Wise v. Withers, 3 Cranch, 331.

The issuing of process after judgment is purely a ministerial act. Briggs v. Woodwell, 10 Mass. 356.

LACEY, J. The appellant contends that the above judicial proceedings fully justify him and that as Justice he could not be held responsible even if he had made some mistake in the exercise of the functions of his office. He also claims complete justification under Sec. 1 of an act entitled "An Act to provide for the punishment of persons violating any of the ordinances of the several cities and villages in this State," approved and in force April 12, 1879; see Session Laws 1879, page 70. The Act so far as it relates to the action of appellant is as follows: "That a warrant for the arrest of offenders may issue in the first instance upon the affidavit of any person that any such ordinance [ordinance of city or village] has been violated and that the person making the complaint has reasonable grounds to believe the party charged is guilty thereof; and any person arrested upon such warrant, shall, without unnecessary delay, be taken before the proper officer to be tried for the alleged offense. Any person upon whom any fine or penalty shall be imposed, may, upon the order of the

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court or Magistrate before whom the conviction is had, be committed to the county jail or calaboose, city prison, work-house, house of correction, or other place provided by such cities or villages by ordinance for the incarceration of such offenders until such fine, penalty and costs shall be fully paid: *Provided*, that no such imprisonment shall exceed six months for any one offense."

In regard to the power of the appellant to issue the warrant, we are inclined to think that the affidavit of J. Overaker was full justification. The writ was a warrant in every respect except bail was allowed till a certain day named; but this permission was for the benefit of appellee if he saw proper to take advantage of it, but as he did not the writ amounted to the same as might have been issued under the plain provisions of the statute. The appellee, therefore, should not be allowed to enter any objections to the form of the warrant. The trial and fine appeared to be regular and no exception could be taken to that even if it had been irregular, as appellant was protected under his character as a judicial officer.

It now remains to be seen whether appellant overstepped the bounds of his jurisdiction in entering the order of commitment. Next, if such order was regular, whether the order justified the peculiar *mittimus* issued and the verbal order to take the appellee to jail. The proper solution of the first point in the above question depends upon the interpretation that is put on the statute. Does the statute mean that before any imprisonment can be ordered by the Magistrate there must be an ordinance passed by the city or village providing for the place where the offender may be imprisoned, or is the act absolute without such ordinance as to the places named in the act, "county jail, calaboose, city prison, work-house and house of correction," the Justice having the option to send him to either at pleasure and desire, the last class simply referring to places not named which shall be fixed by ordinance, those named being regarded as having been fixed by statute? We do not speak with the utmost confidence upon what ought to be the proper interpretation put upon this statute in that par-

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ticular, but we are inclined to hold that the place should be fixed by city or village ordinance, and it should be determined thereby what place of those named should be the one, as well as to fixing some place not named.

The fact that the city or village is entitled to all fines and penalties recovered, and is also liable for the costs of keeping those upon whom fines are imposed in confinement, seems to be a good reason why the Legislature would desire to give the city the entire control of the matter of imprisonment. And in a case of so doubtful a meaning of the section it seems such consideration ought to be sufficient to turn the scale. And then it would seem improper to give the Magistrate such power as to allow him to choose the place; perchance send an offender for some slight offense miles away to the county jail, when there was a calaboose in the city or village better suited.

We think also the order of commitment should also fix the limit at six months, otherwise the jailor or keeper of other place of confinement would not know how long the party to be imprisoned would have to stay if he failed to satisfy the fine and costs. It should not be left to such officer to find out and be the judge of what the law is on the subject. It is the business of such officer to follow the commands of the committing writ.

But what authority had the appellant to issue the committing order which he did? It bears no semblance to the judgment and order of commitment in his docket. It is in form the same as a warrant of commitment in case where a party is bound over by a committing Magistrate where there is a criminal charge preferred, which the Magistrate has no jurisdiction to try, but has jurisdiction to bind the party over to appear and answer to a higher court. The writ issued showed that the party in custody was *probably* guilty of violating a village ordinance; not that he had been fined and committed till fine and costs were paid. It showed that appellee had been bound over to appear to the next term of the County Court, and had failed to give the required bail and had been committed till he did so, or otherwise legally discharged. The amount of

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bail indorsed on the back of the warrant was “\$50 and costs.” The Sheriff could see, and did see, that the County Court had no jurisdiction to try such a case, and refused to receive the appellee or put him in jail. But the imprisonment had been effected by this illegal and unwarranted order and verbal direction by the appellant.

But it is insisted that the appellant is protected by virtue of his judicial character as a Justice of the Peace, and that the issuing of the warrant in question was a judicial act for which the appellant can not be called to account in an action of trespass for false imprisonment.

This will depend upon whether the issuing of the writ was a judicial act within the jurisdiction of the Justice.

We are satisfied that it was not, and also that the issuance of the writ was not a judicial act. There was no judgment or semblance of foundation for it. No such proceeding as it recited or anything like it had ever taken place before the appellant.

In *Board of Trustees v. Schroder et al.*, 58 Ill., a decision that was rendered prior to the passage of the above Act of 1879, it was held: “For the breach of town ordinance the party forfeits a sum of money that may be recovered by the corporation in an action of debt; but the proceeding is not criminal in form. The Justice of the Peace has no more right to order the committal than he would at the end of a trial between two individuals to order the defendant to be imprisoned; and when officers assume to imprison without authority of law, or without any of the forms or processes usual and necessary to be employed, they become liable for false imprisonment * * * The Constitution prohibits it except by due process of law.” In *Thomas v. Hinsdale et al.*, 78 Ill. 259, it was held, if a Justice of the Peace issues an attachment when not authorized by law to do so, his ignorance as to the extent of his authority is no excuse. The issuing of final process after judgment is purely a ministerial act. *Biggs v. Woodwell*, 10 Mass. 356. Even if the judgment had been authorized the appellant did not issue the kind of a writ called for by it, and his act in this particular being ministerial and outside of his judicial

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authority, he is liable in the kind of an action brought on account of the false imprisonment. It is objected that the evidence concerning appellee's illness and its cause was improperly admitted and the case of *Miles v. Weston*, 60 Ill. 361, is cited for authority against it; but in this case it will be observed, the declaration contains no averments under which the evidence could be given. In this case, by the amendment to the declaration, there were such averments.

There was evidence in the case tending to show malice; the instruction therefore on that head was not improper. Some other instructions were not strictly accurate, but we think they were not so seriously defective or misleading that the jury could have been misled to appellant's injury.

The judgment of the court below is therefore affirmed.

Judgment affirmed.

THE CHICAGO, BURLINGTON & QUINCY RAILROAD
COMPANY

V.

JAMES SULLIVAN.

Railroads—Action for Damages for Personal Injuries Sustained by Passenger in a Collision—Pleadings—Variance—Evidence—Recovery of \$5,000, not Excessive—New Trial—Newly Discovered Evidence.

1. In an action to recover damages for personal injuries suffered by the plaintiff in a collision while a passenger on the road of the defendant company, it is *held*: That there was no variance between the declaration and the testimony; that proof of the breaking down of the plaintiff's nervous system and that his nerve trouble might result in death, was properly admitted; that the rules of pleading did not require the plaintiff to set out in his declaration the evidence relied upon; that the evidence sustains the verdict for the plaintiff; that this court will not interfere with the verdict, the credibility of the witnesses and weight of the evidence being questions for the jury; that the verdict for \$5,000 is not excessive; that the court below properly refused to grant a new trial on the ground of newly discovered evidence.

2. Newly discovered evidence, which could have been procured by due diligence, or which is merely cumulative, unless decisive in character, is insufficient as ground for a new trial.

21	580
41	274
21	580
58	187
21	580
88	126

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[Opinion filed December 11, 1886.]

APPEAL from the Circuit Court of La Salle County; the Hon. GEORGE W. STIPP, Judge, presiding.

MESSRS. SAMUEL RICHOLSON, O. F. PRICE, and RICHOLSON & GENTLEMAN, for appellant.

There is a fatal variance between the allegations and the proofs.

“The primary object of a special count in a declaration is to apprise the defendant of the true ground upon which the plaintiff claims to recover and give him notice of what he will be called upon to meet upon the trial.” R. R. Co. v. Wilcox, 12 Ill. App. 47; T., W. & W. R. R. Co. v. Briggs, 85 Ill. 80; City of Bloomington v. Goodrich, 88 Ill. 558; Gavin v. Chicago, 97 Ill. 66; T., W. & W. R’y Co. v. Jones, 76 Ill. 311.

The verdict of the jury was contrary to the weight of the evidence.

MESSRS. DUNCAN & O’CONOR, for appellee.

The evidence fully warrants the finding of the jury. They had before them, *first*, undisputed evidence of good health prior to the accident; *second*, a concurrence of evidence produced by both parties demonstrating beyond doubt that plaintiff’s health is irreparably ruined; *third*, the absence of any cause for his ill-health aside from his injury in the accident; *fourth*, the opinion of the plaintiff’s experts that his condition is due to shock received in the accident; *fifth*, the opinion of defendant’s experts that plaintiff’s condition is due to rheumatism of the heart, coupled with the admission that the rheumatism might have resulted from the shock.

A defendant can not be permitted to allege in mitigation of damages that the injury was more aggravated by reason of the plaintiff’s previous unhealthy condition. Field on Damages, Sec. 613; Ehrgott v. Mayor, 96 N. Y. 264 (48 Am. R. 622); McNamara v. Village of Clintonville, 62 Wis. 207 (51 Am. R. 722).

Newly discovered evidence to warrant a court in granting

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a new trial, must be decisive in its character and not merely cumulative. *Smith v. Shultz*, 1 Scam. 490; *Martin v. Ehrenfols*, 24 Ill. 187; *Calhoun v. O'Neil*, 53 Ill. 537; *T., W. & W. R'y Co. v. Seitz*, 53 Ill. 452; *Holmes v. Stateler*, 57 Ill. 209; *Fuller v. Little*, 69 Ill. 229; *Tallman v. Becker*, 85 Ill. 183; *T., W. & W. R'y Co. v. Ingram*, 85 Ill. 172.

Newly discovered evidence, to warrant a new trial, must go to the issues tried by the jury and not merely to mitigate the damages. *Schlencker v. Risley*, 3 Scam. 486; *Lafflin v. Herrington*, 17 Ill. 399; *Calhoun v. O'Neal*, 53 Ill. 354; *Crozier v. Cooper*, 14 Ill. 139.

Before a new trial will be granted on account of newly discovered evidence, it must appear that it could not have been discovered before the trial by the exercise of due diligence. *Crozier v. Cooper*, 14 Ill. 139; *Lafflin v. Herrington*, 17 Ill. 399; *Wright v. Gould*, 73 Ill. 56; *Edgmon v. Ashelby*, 76 Ill. 161; *Champion v. Ulmer*, 70 Ill. 322; *Bruce v. Truett*, 4 Scam. 454.

WELCH, J. On the 16th day of November, 1883, the appellee was a passenger on the train of the appellant from Ottawa to Streator. When near Streator a freight train of the appellant ran into the rear of the coach in which appellee was seated. Appellee avers in his declaration that the appellant by its servants negligently allowed said car in which the appellee was, to be run into and telescoped by another locomotive engine and cars operated by the appellant, by means whereof said car was wrecked, and the appellee with great force and violence was crushed, shocked, bruised, lamed, forcibly hurled forward in said car and jammed between the seats thereof, and in divers other ways abused and injured; by means whereof one of his legs was seriously crushed and bruised; one of his hips and his side above said hip permanently injured; one of his hands cut and disabled; his head cut and gashed, and he was otherwise greatly injured, bruised, hurt, wounded, lamed and disabled. The trial resulted in a verdict and judgment for the appellee for \$5,000, from which this appeal is taken. Various errors are assigned. We shall examine the errors in the order in which they are presented in appellant's brief.

“There is a fatal variance between the declaration and testimony.” It is claimed by counsel for appellant that under the allegation that he “was crushed, shocked, bruised, lamed and in divers other ways abused and injured, by means whereof * * * he became and was sick, lame and disordered and so remained for a long time, to wit, hitherto. No proof of the breaking down of the nervous system of the appellee, or proof that his nerve trouble might result in his death was competent,” and we are referred to *Ayers v. Chicago*, 111 Ill. 411; *C., B. & Q. R. R. Co. v. Wilcox*, 12 Ill. App. 47. The variance in the cases *supra* consisted in a difference between the statements of the declaration and the proofs as to how the injury occurred. In other words, as to the mode of its infliction and not as to its extent or character. In the case of the *Eagle Packet Co. v. Defuis*, 94 Ill. 603, Justice Dickey said: “It is insisted that, as the declaration did not allege plaintiff had suffered a permanent injury, it was error to give the third and seventh instructions, which authorize the jury to award the plaintiff damages for such permanent injury as the evidence showed he had sustained. This position is untenable. The declaration expressly alleges that the plaintiff “then and there became sick, lamed and disordered and so remained for a long time, to wit, hitherto, etc. The permanency of plaintiff’s injury was merely evidence to be considered by the jury in determining the severity of the plaintiff’s sickness, lameness, and disorder, and the rules of pleading do not require the plaintiff to set forth in his declaration the evidence upon which he relies.” The position taken by the counsel for appellant as to what evidence was competent under this declaration and that there was a variance between the *allegata et probata*, is not well taken. Under the authority in 94 Ill. 603 *supra*, evidence of the breaking down of appellee’s nervous system and that it might result in his death was competent.

It is next insisted by counsel for appellant, “that the verdict of the jury was contrary to the weight of the evidence.” It was admitted on the trial that the injury was occasioned through the negligence of appellant. It being conceded that the injury to the appellee was the result of the negligence of

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appellant, the only question involved is, as to the extent to which the appellee suffered injury from the acts of appellant. In order to accurately determine the scope and extent of the injury, we must consider the physical condition of appellee at the time of and prior to the injury, his physical condition since, and to what extent is his present condition attributable to the injury. The evidence shows that he was a healthy, stout, active and sturdy farm hand at the time of the injury; was between twenty-seven and twenty-eight years of age. His condition after the injury as described by himself was: "After I got out through the window I was cut, bleeding and bruised. I was cut on the head, back of the ear and on the hand; and bruised on the head, knee and side. * * * When I got home that evening I was in a bad condition, and the next morning I was in a worse condition. * * * My head and side were very sore and painful, especially my right side. * * * From that time on the pain has continued ever since. * * * Since the injury my health is and has been very poor. I am not able and have not been able since the injury to perform any manual labor; since then my ability to sleep is poor, very flighty, very restless; and my appetite since then is very poor." He was sustained as to his physical inability to do labor, etc., by Miller, Lawless, Forristol, Schener and Sullivan. To what extent is his present condition attributable to the injury? The evidence on this question is conflicting. The evidence for the appellee tended to show that his present condition is attributable to the injury. Dr. Dyer testifies: "I have been a physician for thirty years; three years an army surgeon and three years pension examiner. Have had special experience in nervous diseases and nerve injuries resulting from shocks and bruises. Never saw appellee until yesterday. I analyzed his urine this morning. The condition of his urine showed evidences of injury to his spine very markedly present. I found his pulse a little while ago beating at the rate of 131 per minute. The normal condition of the pulse is from sixty to eighty. The pulse at the rate I found it indicates a very bad condition. * * * When the nerves that supply the heart do not stimulate it to action, the

consequence is we have a very rapid, quick action of the heart. I have observed the color of his face. It is the result of the rapid action of the heart. * * * Appellee is a totally disabled man. It is impossible for a man with a pulse at 130 to do manual labor. * * * It leads to other organic disturbances and breaking down of the system. In the ordinary course the results will be disastrous to him." His opinion as an expert was, that the present condition of the appellee was attributable to the injury received at the time of the accident.

Dr. Hathaway testifies: "Have been a physician and surgeon in Ottawa since 1856. Have had experience in examining patients suffering from effects of shocks. Did not know plaintiff before the accident. In the winter of 1883 and 1884, or spring of 1884, I met him at my office in Ottawa. Have made four or five examinations of him in my office; and perhaps six or eight casual examinations outside of the regular examinations. Upon each and all of these times I examined his heart's action as indicated by his pulse. Have made such tests by pulsation and auscultation. When I first examined him I found in the right iliac region on a line running from the navel to the anterior superior spinous process, a swelling; a line so run would bisect the region of the swelling. I then, at such first examination, found the pulse ranging from 115 and 120, and the heart's action weak and rapid. The swelling was from three to four inches in diameter. I undressed and laid him on a bed. While lying down his pulse beat 115, and sitting up 120. I saw him a couple of months afterward and found him in same condition and the swelling the same. In a couple of months I examined him again in my office, and my last examination in my office was about two months ago. Normal condition of pulse is from sixty to eighty. His heart's action is enfeebled and indicates sickness of the nervous system and leads to inability to work; may produce disordered digestion, or disordered condition of the liver or kidneys, or organic or functional diseases of any of the organs, brain as well as otherwise. He is not capable of either mental or physical exercise to any considerable extent. Generally speaking the outlook would be that it would be very ques-

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tionable whether he would ever recover. In the ordinary course of things the outcome would be unfavorable. The color of his face is not normal; it is produced by the rapid action of the heart. Was present at the analysis of his urine this morning, which showed a nerve trouble. The heart's rapid action breaks down the nerve tissues and produces the undue amount of phosphate deposit in the urine which was found." His opinion was that his present condition was attributable to the injury received at the time of the accident.

Dr. Wood testifies for the appellant that the appellee could not be in a state of nervous prostration, and be as well nourished as he was. * * * He would fall away for want of nourishment. Dr. Hard testifies for the appellant that he had examined the appellee and found him well nourished; his muscles were well developed and the feeling very hard and very natural; he was fully nourished. He examined the appellee's heart and gave his opinion that his affection was chronic rheumatism of the heart or pericardium. * * * "If appellee had been suffering from nervous prostration for two years he would now be a physical wreck. * * * I think a shock to the nervous system could not keep up a high rate of pulse for any constant period without some serious results; could not be kept up for a period of a year." Dr. Weis and Dr. McArthur corroborate Dr. Hard. Dr. McArthur testifies further, "Plaintiff's condition is far from being healthy. A young man of the age of twenty-seven years, fully developed, robust and sturdy, never having been sick, with perfect constitution, if he were affected with a nervous complaint, would be able to hold out against it much longer than a weaker or less sturdy subject. I should judge, having seen his body bare, that he now weighs 160 pounds, and if he weighed 185 pounds in 1883, he has wasted twenty-five pounds in the past two years." This was the evidence as to his present condition and the cause of it. The jury by their verdict found that his present condition was attributable to the injuries received in the accident. And as said by Justice Walker in *Bishop v. Buesee et al.*, 69 Ill. 403, the jury under

the law have the exclusive right to pass upon and determine the weight of evidence, and to find the facts. * * * In all such cases the presumption is that the jury have done their duty and found correctly; that the Judge trying the case and being in a position to determine accurately whether the finding is right, and acting under the responsibility of his place, has determined correctly in overruling the motion for a new trial. These presumptions being in favor of the finding, we always feel a reluctance in interfering; nor can we adopt a rule that mere numbers of witnesses should determine the question. * * * The jury judge of the manner and appearance of witnesses on the stand, their surroundings, their interest, their prejudice and feelings manifested in the case, none of which do we see. We must therefore leave the question of credibility and the worth of evidence where the law has placed it, with the jury." C., B. & Q. R. R. Co. v Lee, Adm'x, 87 Ill. 457.

3. It is further insisted by counsel for appellant that the damages are excessive. In view of what we have said, if his present condition is attributable to his injuries, which the jury by their verdict have found, we can not say that the damages are excessive.

It is further insisted that the court erred in not granting a new trial on the ground of newly discovered evidence. The newly discovered evidence to warrant a court in granting a new trial must be decisive in its character, and not merely cumulative. Smith v. Shultz, 1 Scam. 490; Morrison v. Stewart, 24 Ill. 24; T., W. & W. R. R. Co. v. Seitz, 53 Ill. 452; Laird v. Warren, 92 Ill. 204; McCollom v. Indianapolis & St. Louis R. R. Co., 94 Ill. 534; Abrahms v. Weiller, 87 Ill. 179; Schoenfeld v. Brown, 78 Ill. 487; McKenzie v. Remington, 79 Ill. 388. There must also have been due diligence to procure and inability to obtain the newly discovered evidence of this decisive character. Wood v. Echternach, 65 Ill. 149; Crozier v. Cooper, 14 Ill. 141; Wright v. Gould, 73 Ill. 56; Edgmon v. Ashelby, 76 Ill. 161. Applying the rules laid down in the cases *supra*, to the newly discovered evidence in this case, we find that it is wholly insufficient to justify

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the granting a new trial. It is purely cumulative, tending simply to show that the appellee's ill-health might be attributed in part to nocturnal emission produced by self-abuse. It was not decisive in its character. It only goes to the measure of damages, and is not conclusive as to the amount. We hold that by the exercise of due diligence it might have been discovered. We adopt in this case the language used by Justice Walker in 69 Ill. *supra*: "We decline to disturb the finding in this case; the verdict does not appear to us clearly and palpably against the evidence."

We find no error in the ruling of the court in the admission of evidence, or in the instructions given. Substantial justice has been done.

Judgment affirmed.

BOARD OF EDUCATION
V.
SMITH HOAG.

Practice—Execution against School Directors—Motion for New Trial—Sec. 56, Practice Act—Motion to set Aside Judgment—Discretion.

1. It is error to award general execution upon a judgment against a Board of School Directors. Such judgment can only be enforced as provided in ¶ 50, Chap. 122, Starr & C. Ill. Stat.

2. Under Sec. 56 of the Practice Act the trial court must entertain a motion for a new trial when it is duly presented in writing during the term at which judgment is entered.

3. When the defendant was not represented at the trial, a motion to set aside the judgment is addressed to the discretion of the court.

[Opinion filed December 11, 1886.]

APPEAL from the Circuit Court of Kane County; the Hon. ISAAC W. WILSON, Judge, presiding.

Messrs. EDWARD C. LOVELL and FRANK CROSBY, for appellant.

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Motion for new trial should be at trial term. *Campbell v. Conover*, 26 Ill. 64.

When motion in writing for a new trial, specifying grounds, is duly made, stay of final judgment until the motion can be heard is absolute. *Hearson v. Graudine*, 87 Ill. 115.

A motion for a new trial may be filed during the term at which final judgment is entered. *O. & F. R. V. R. R. Co. v. McMath*, 91 Ill. 104.

A motion for a new trial is in time if made at the term at which final judgment is entered. *C. & N. W. R. R. Co. v. Dimick*, 96 Ill. 42.

The effect of a motion for a new trial is to stay final judgment until such motion is overruled. *People v. Cary*, 105 Ill. 264.

Mr. R. N. Botsford, for appellee.

The court rightfully refused to set aside the judgment. *Union Hide and Leather Company v. Woodley*, 75 Ill. 435; *Trentler v. Halligan*, 86 Ill. 39; *Palmer v. Harris*, 98 Ill. 507.

Until the judgment was set aside or vacated, the appellant was in no condition to take any further steps in the case. The vacation of the judgment would not set aside the verdict upon which the judgment is based. *Edwards v. Irons*, 73 Ill. 583.

No motion was in fact made for a new trial. The nearest approach to it was the motion for leave to file such a motion.

No motion was entered upon the record for a new trial nor was the court asked to enter such a motion. The filing of such a motion, if in proper order of time, is a matter of right; no leave of court to file it was necessary and it seems counsel so regarded it, as upon the written motion it bears the file mark of the clerk of December 2, 1885, the day leave was asked to file it. In all cases cited by appellant in support of this alleged error of the court below, except the case of *People v. Gary*, 105 Ill. 264, the motion for a new trial was made before the final judgment was entered, and in that case the motion for a new trial was coupled with a motion to vacate the judgment.

WELCH, J. This was an action of assumpsit brought by the appellee against the appellant. General issue filed.

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On the 27th day of October, 1885, this cause came on for trial, a jury was called and verdict rendered for appellee on which verdict judgment was entered by the court. There was no one present at the trial representing the appellant. On the first day of December appellant appeared and moved the court to set aside the judgment, which was denied. Motion by appellant to set aside judgment for the purpose of entering motion for new trial. Motion overruled. Motion by appellant for leave to file motion for new trial. Motion denied. To each of the said rulings of the court the appellant at the time excepted. Motion for new trial and reasons therefor filed December 2, 1885. This motion was filed during the October term at which judgment was rendered.

The first error assigned is, that the court refused to vacate the judgment so entered and let the appellant in with its defense. On the ground this motion was based it was one addressed to the discretion of the court, and we can not say there was any abuse of that discretion. The judgment should have been vacated or modified for another reason as it awarded execution against the appellant. *Botkin v. Osborne*, 39 Ill. 101.

The second error assigned is that the court refused to entertain a motion for a new trial which was presented in open court in writing on one of the days of the term at which the judgment was entered and bearing the file mark of the clerk of the court. Under Sec. 56 of the Practice Act, it is provided: "If either party may wish to except to the verdict or for other causes to move for a new trial he shall before final judgment be entered or during the term it is entered by himself or counsel, file the points in writing particularly specifying the grounds of such motion, and final judgment shall thereupon be stayed until such motion can be heard by the court." In this case judgment was entered immediately upon the rendition of the verdict. This motion was presented during the term at which the judgment was entered. It was in writing, particularly specifying the grounds of the motion and it was filed with the clerk. The appellant did all that it was required to do under the statute, *supra*. Its right to file a motion for a new trial was a right conferred by law. A right

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which the court had no discretion in regard to or right to refuse. Appellant had the right to make the motion and having filed the same with the clerk in apt time it was the duty of the court to have entered, heard and disposed of the motion for a new trial. It was error to refuse it. For the errors herein indicated the judgment is reversed and cause remanded with directions to enter, hear and dispose of the motion for a new trial, appellee to pay the costs in this court.

Reversed and remanded.

HERMAN CLASSEN

V.

JOHN CUDDIGAN.

Credibility of Witnesses—Question for the Jury—Newly Discovered Evidence.

1. Where the question involved depends on the credibility of the witnesses, this court will not interfere with the finding of the jury.

2. Newly discovered evidence which is merely cumulative is insufficient as ground for a new trial.

[Opinion filed December 11, 1886.]

APPEAL from the County Court of Iroquois County; the Hon. S. G. BOVIE, Judge, presiding.

MESSRS. CHARLES PAYSON and DOYLE, MORRIS & PIERSON, for appellant.

MESSRS. KAY & EUANS, for appellee.

WELCH, J. This was a suit brought by appellant against the appellee before a Justice of the Peace on a distress warrant. There was a trial before the Justice and judgment for appellant and an appeal was taken to the County Court where

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there was another trial, verdict and judgment for the appellee, from which this appeal is taken. The appellee had rented from the appellant some eighty acres of land to put in corn for which he was to give as rent one-third of the corn raised. He only delivered about 343 bushels of corn. The evidence as to the amount of corn that was raised was conflicting; the evidence on the part of appellant tended to show that the land would have averaged about twenty bushels of corn per acre, of which one-third would have amounted to 190 bushels more than was delivered by the appellee to him, and that corn was worth 30 cents per bushel. The appellee and his witnesses testified that the ground was very wet and would not average near twenty bushels per acre, and the appellee and his two sons testify that they delivered all of the one-third of the corn raised. The question of the credibility of the witnesses was one specially for the jury. They having found for the appellee we are not disposed to interfere with the finding.

It is further insisted by counsel for appellant that the court erred in not granting a new trial on the ground of newly discovered evidence. The newly discovered evidence was merely cumulative and impeaching, and as uniformly held by the Supreme Court a new trial will not be granted when the newly discovered evidence is merely cumulative. *Skelley v. Boland*, 78 Ill. 438; *Clayes v. White*, 83 Ill. 540; *City of Elgin v. Rennick*, 86 Ill. 498; *Harvey v. Collins*, 89 Ill. 255. There was no error in refusing a new trial.

Judgment affirmed.

AGRICULTURAL INSURANCE COMPANY

V.

WILLIAM FRITH, GUARDIAN.

Fire Insurance—Loss when House is Unoccupied—Evidence.

In an action upon a policy of fire insurance it is *held*: That the verdict for the plaintiff is manifestly against the weight of evidence, which shows the house to have been unoccupied at the time of the loss within the meaning of the clause exempting the defendant from liability while unoccupied.

[Opinion filed December 11, 1886.]

APPEAL from the Circuit Court of Kankakee County; the Hon. ALFRED SAMPLE, Judge, presiding.

Mr. ELBERT H. GARY, for appellant.

The clause in a policy of insurance that it shall be void during unoccupancy as a dwelling of the building insured, is binding and effective. Its meaning is that there must be a person living in the building at the time of the fire or the policy will be avoided. *American Ins. Co. v. Padfield*, 78 Ill. 167; *Same v. Foster*, 92 Ill. 334; *Keith v. Ins. Co.*, 92 Mass. 228; *Lith v. Ins. Co.*, 136 Mass. 491; *Bennett v. Agl. Ins. Co.* (51 Conn.), 13 Ins. L. Jrl. 817; *Alston v. Ins. Co.*, 80 N. C. 326; *Ætna Ins. Co. v. Meyer*, 63 Ind. 238; *Herman v. Ins. Co.*, 85 N. Y. 162.

The uncontradicted evidence shows that the house in question was, at the time of the fire, "unoccupied as a dwelling." In such an event the policy provides it shall be void and of no "force so long as said dwelling house shall be so unoccupied."

Messrs. STEPHEN R. MOORE and O. G. BARTLETT, for appellee.

The proof shows the house was to be occupied as a tenement house, and is so expressed in the policy. The house was worth but little over \$100. The insurance company knew that such a house commanded poor tenants. There is no dispute,

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the tenant paid the rent to November 1st; that the tenant was in jail for a failure to pay a fine for assault and battery; that his wife remained in the house until two weeks or less before the fire. She took the child to her parents intending to return to the house. She says she left Tracey's effects in the house when she went away, but left the key with him, or his legal custodian, the Sheriff. Tracey left his effects in the house. It is true they were very poor people, and their goods were of but little value, but such as they were he kept them in this house, and the proof shows the house was occupied. Two juries pass on this question of fact, and it is matter purely for the jury, and the court can not say that the jury was not warranted in so finding.

LACEY, J. This was a suit commenced by appellee against appellant before a Justice of the Peace, and from there appealed to the Circuit Court, and finally, after one verdict had been set aside and a second one resulting in appellee's favor and damages assessed at \$108.88, the court overruled a motion for a new trial and rendered judgment in favor of appellee, and from this judgment this appeal is taken.

The main defense was made under the following clause in the insurance policy, to wit: "If without the written consent of the company indorsed on the policy such dwelling house shall cease to be occupied as a dwelling, then so long as said dwelling house shall be so unoccupied, this policy shall be void and of no force or effect." The house insured was a dwelling house, and insured by appellee as the guardian of Frank Hasney, a boy eleven years old, who was the owner of the house and lot in question. The house was totally destroyed by fire about 10 o'clock at night, October 15, 1884, and was worth over \$100. The evidence is that the dwelling house so insured had been occupied by a tenant, one H. M. Tracey and wife, until two weeks before the last day of July immediately preceding the time it was consumed by fire. On the last day of July H. M. Tracey became involved in some trouble and was fined one dollar, and sent to the county jail, and remained there until October 24th following the fire. Mrs. Tra-

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cey, the wife of H. M. Tracey, continued to occupy the dwelling until about two weeks previous to the fire, when she left the house and went to Mattoon, Illinois, and hired out as a servant to do general housework. Upon leaving she sold all the furniture and household goods, except one old cupboard she made herself, locked the door, and gave the door-key to one Nichols, to hand to the Sheriff for her husband. No other occupant was in the house till the time of the fire. It may be she intended to return to the house at some indefinite time. It is quite clear that this house was not occupied as a dwelling. But appellee contends the evidence brings the case within the rule announced in the case of *Phoenix Ins. Co. v. Tucker*, 92 Ill. 64. We do not think it falls within the rule announced in that case, but rather within the rule announced in the case of the *American Ins. Co. v. Padfield*, 78 Ill. 167.

“The clause in the policy should not be construed to mean a constructive, but an actual occupation.” We therefore think the verdict was manifestly against the weight of the evidence. So holding it is not necessary to notice any of the other objections raised. Because the verdict is greatly contrary to the weight of the evidence, the judgment is reversed.

Judgment reversed.

ERNEST RADEKE
v.
GEORGE H. COOK.

Practice—Question for Jury—Objections, not Raised Below—Newly Discovered Evidence.

1. Where the question involved is one of fact, this court will not interfere with the verdict of the jury unless it is clearly against the weight of evidence.

2. An assignment of error based on newly discovered evidence does not lie when it was not specified in the motion for a new trial.

3. An objection, raised here for the first time, to the filing of counter affidavits on a motion for a new trial, can not be considered by this court.

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[Opinion filed December 11, 1886.]

APPEAL from the Circuit Court of Kankakee County; the Hon. ALFRED SAMPLE, Judge, presiding.

Messrs. RICHARDSON Bros., for appellant.

Mr. JAMES N. ORR, for appellee.

WELCH, J. This was an action brought by the appellee against the appellant before a Justice of the Peace to recover a balance claimed to be due for painting, etc. The appellee recovered a judgment in the Justice's court and also in the Circuit Court. By the contract originally made, appellee was to paint the house of the appellant with two coats of plain painting outside and upstairs, and lower part, except bed-room grained or oiled, as appellant should wish. The price agreed upon for the work was \$150, appellee to furnish all the material. Appellee claims that after he had commenced and painted the outside of the house one coat the appellant changed his building and put the up stairs hard pine finish, and changed the painting to hard oil finish and varnish; that this change required him to shellac all the doors and frames and rub them down and then put on two coats of hard oil finish and one coat of varnish; that the material cost more and required one-third more time, and that he was entitled to \$15 extra, and for the other work not included in the original contract he claimed \$9.50, making his claims the sum of \$174.52, on which he admits he had received the sum of \$111. The appellant claims to have paid prior to the suit the sum of \$125.75 and the sum of \$38.50 in a garnishee proceeding on a judgment in favor of Keerrosch and Stoge against the appellee. This sum was paid while this suit was pending, making the sum claimed to have been paid by the appellant to the appellee \$160.20. The evidence was conflicting, but that for the appellee, if true, established a claim for \$63.52 without deducting the sum of \$38.50 paid by appellant as garnishee. The jury evidently relied on his testimony but deducted from his

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claim the amount appellant had paid as garnishee and gave their verdict for the exact balance, \$25.02. There was no exception taken to the evidence. No instructions were asked or given. The question submitted to the jury was one of fact. When that is the case unless the verdict is clearly against the weight of the evidence, the verdict will not be disturbed. *Johnson v. Smallwood*, 88 Ill. 73; *McClelland v. Mitchell*, 82 Ill. 35; *Corwith v. Colter*, 82 Ill. 585. The verdict in this case is sustained by the evidence.

It is insisted by the counsel for the appellant that the court erred in overruling appellant's motion for a new trial on the ground of newly discovered evidence. Appellant did not assign in his written motion for a new trial newly discovered evidence as one of the reasons for it. Sec. 56 of Practice Act provides, "if either party may wish to except to the verdict or for other causes to move for a new trial, * * * he shall, before final judgment be entered or during the term it is entered, by himself or counsel file the points in writing particularly specifying the grounds of such motion." We hold that newly discovered evidence not having been specified in his written motion as one of the grounds for a new trial, that no error can now be assigned as to the action of the court based on newly discovered evidence. That question was not before the court in such way as to require the court to pass upon it. We can not presume that the court did pass upon it.

It is also insisted that the court erred in allowing counter affidavits to be filed to those filed by appellant based on the ground of newly discovered evidence. In view of what we have said as to the ground for a new trial based on newly discovered evidence, there was no error. The record shows no exception or objection to the filing of the counter affidavits. It does not appear that they were used on the motion for a new trial. If they were submitted on the motion it was by consent and without objection. Appellant can not now be allowed to complain. Finding no error the judgment is affirmed.

Judgment affirmed.

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DAVID N. LOWE
V.
THE TOWN OF AROMA.

*Highways—Obstruction—Action for Penalty—Evidence—Act of 1851—
Sec. 52, Chap. 121, R. S. —Official Action—Presumption of Regularity.*

1. In an action to enforce the statutory penalty for the obstruction of a highway, it is *held*: That the verdict for the plaintiff is supported by the evidence; that the order of the Commissioners, laying out the road, was properly admitted, although the record showed no assessment and payment of damages, the act of 1851 not requiring a record of anything but the order; that Sec. 52, Chap. 121, R. S., is also applicable; that the evidence shows the road was duly established and opened; and that it established the existence of the road by user for a period of more than twenty years prior to the alleged obstruction.

2. Sec. 52, Chap. 121, R. S., making the Town Clerk's record *prima facie* evidence of the regularity of official action in relation to highways, applies where the road was established before as well as after its enactment.

[Opinion filed December 11, 1886.]

APPEAL from the Circuit Court of Kankakee County; the
Hon. ALFRED SAMPLE, Judge, presiding.

MESSRS. RICHARDSON BROS. and T. P. BONFIELD, for appellant.

MR. H. K. WHEELER, for appellee.

LACEY, J. This action was brought before a Justice of the Peace by appellee against appellant to enforce the statutory penalty for obstruction of a highway. A trial was had before the Justice and resulted in judgment in favor of appellee for \$22, from which an appeal was taken to the Circuit Court where a new trial was had before a jury and verdict and judgment in favor of appellee for \$3 and costs, from which the appeal is taken. The main cause of error assigned by appellant is that the verdict is against the weight of the evidence.

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It is claimed that the appellee neither made out the existence of the road at the *locus in quo* at the time of the alleged obstruction by user or by being laid out by actual legal authority.

The appellee offered in evidence the order of the Commissioners of Highways ordering the laying out of the road in 1855.

This evidence was objected to on the ground that the record showed no assessment and payment of damages. This objection the court overruled and admitted the record in evidence. This is assigned for error. We perceive no error in this. At the time this road was laid out the Act under which the proceedings were carried on (the Act of 1851,) did not require any record of anything except the order laying out the road. *Waddle v. Duncan*, 63 Ill. 223.

Again, Sec. 52, Chap. 121, R. S., provides that, "the record of the Town Clerk, or a certified copy of such record, and papers relating to the establishment, location, alteration, widening or vacation of any road shall be *prima facie* evidence in all cases; that all the necessary antecedent provisions had been complied with, and that the action of the Commissioners or other person and officers in regard thereto was regular in all respects." This provision applies to all cases as well as those where the road had been established before the act as after it. One Clark was the surveyor, and surveyed and located the road as here ported on the half-section line agreeable to the order of the Commissioners. It is attempted on the part of appellant to show that the actual survey of the road was not on that line, but west of it; that the road had been traveled west of the line of the *locus in quo* since 1855, the time of its establishment; that the road was not opened within five years from its laying out, and that the proceeding to establish the road in consequence became void. But we think the better evidence is that it was traveled east and on the half-section line, and that the obstruction and fence for forty rods was moved into the traveled road seven or eight years before the trial by the grantor of appellant, and in 1884 was removed by the Commissioners and set back again by

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appellant, and for this obstruction this suit is brought. We think the appellee has established by a clear preponderance of the evidence that the road was established by legal authority and opened within five years therefrom, and besides has as well established its existence by user for a period of time for more than twenty years before the alleged obstruction. The verdict is clearly justified by the evidence, and we find that the instructions as a whole are fair. It would serve no good purpose and we will not undertake to examine all the evidence or instructions in detail, but are satisfied that justice has been done.

Finding no error in the record the judgment is affirmed.

Judgment affirmed.

THE CITY OF ELGIN

V.

ELLEN RIORDAN.

Municipal Corporations—Defective Sidewalk—Action for Damages for Personal Injuries—Variance—Evidence—Instructions—Verdict, not Excessive.

In an action against a municipal corporation to recover damages for a personal injury resulting from a defective sidewalk, it is *held*: That there is no variance between the declaration and the evidence; that evidence as to the condition of the stringers was properly admitted under an allegation that there was, and for a long time had been, loose and broken planks and holes in, and upon and along said sidewalk; that certain instructions, making it plaintiff's absolute duty promptly to employ competent medical treatment, were properly modified; and that a verdict for \$500 for plaintiff is not excessive.

[Opinion filed December 11, 1886:]

APPEAL from the Circuit Court of Kane County; the Hon. ISAAC G. WILSON, Judge, presiding.

MESSRS. FRANK CROSBY and F. W. JOSLYN, for appellant.

The cause assigned for the alleged injury having been set

forth with minuteness and particularity, the cause made by the proof must correspond with the averment, or there can be no recovery. 1 Chitty's Pleadings, 7 Am. Ed., 427.

In a case in which the declaration charged that the injury was received by reason of broken planks in the sidewalk, and the proof showed that the effect was that two planks had been removed from the sidewalk, the variance between allegation and proof was held fatal. *Bloomington v. Goodrich*, 88 Ill. 558.

The fifth instruction as given, entirely ignored the element of contributory negligence on the part of the appellee in not employing a physician. This omitted element should have appeared. *W., St. L. & P. R. R. Co. v. Rector*, 104 Ill. 296, 305; *T., W. & W. R. R. Co. v. Eddy*, 72 Ill. 140.

Appellant was entitled to an instruction upon the hypothesis that the evidence showed appellee's injuries were aggravated by her own neglect. *H. & St. J. R. R. Co. v. Martin*, 111 Ill. 219, 234.

Mr. JAMES COLEMAN, for appellee.

A city is liable for injuries caused by defective sidewalks when it knows, or can by ordinary care know, that they are out of repair and in a dangerous condition, and then sufficient time elapses in which to make the necessary repairs before the injury is received. *Bloomington v. Bay*, 42 Ill. 503; *Joliet v. Verley*, 53 Ill. 58; *Chicago v. Langlass*, 66 Ill. 361; *Chicago v. McCarthy*, 75 Ill. 602.

If the sidewalk was out of repair for a long time before the accident occurred, that constitutes notice. *Springfield v. Doyle*, 76 Ill. 202; *City of Chicago v. McCarthy*, 75 Ill. 602.

WELCH, J. This is an action on the case against appellant to recover damages by reason of an alleged injury received by appellee upon a sidewalk in the city of Elgin on the east side of State Street. The declaration contains four counts: The first averring that there were at, etc., loose and broken planks and holes upon and along said sidewalk and that a person who was then walking with appellee stepped on or near the end of

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one of the planks which was then and there loose, unfastened and unnailed in said walk ; that the same flew up and tripped her and threw her with great force and violence upon the ground so that then and there her left arm was by reason of such dangerous, dilapidated and defective sidewalk sprained, fractured and broken, and she was otherwise greatly sprained, hurt, bruised and injured, etc.

The second count avers that appellee was tripped up by a loose, unfastened, unnailed plank and was thrown with great force, etc.

The third count avers that appellee was tripped up by a loose and unfastened plank and thrown, etc.

The fourth count avers that appellee was tripped up by a loose and unfastened plank and thrown, etc.

It is first insisted by counsel for appellant that the evidence does not support the declaration. That there was a variance between the *allegata et probata*. The appellee says she went to the coal yard on the west side of Fox river with her husband and Mr. Bartels ; when she was coming back on the walk Bartels on the inside and she on the outside of the walk, Bartels stepped on a loose plank, she stepped after him and was tripped up and stumbled down ; she thinks the plank that flew up was about six or eight inches wide ; Bartels says he went with appellee to the coal yard and as they were returning on the sidewalk, appellee was on his right side, that he stepped on a board, it flew up and she fell and hurt her wrist ; the end of the plank where she was, flew up ; she got her foot under it and fell. Patchen says : "Appellee was about a foot back of Bartels who stepped on the end of a plank ; appellee stumbled and caught her foot under a plank ; Bartels stepped a little over the stringer and that raised up the other end ; he stepped right off but it caught appellee's foot and she was tripped."

We are unable to perceive any variance. The averment that appellee "was tripped up by a loose and unfastened plank" is substantially proven by the testimony.

It is further insisted by counsel for appellant that the court erred in admitting evidence as to the condition of the string-

ers, there being no specific averment in the declaration as to their condition. The averment is that the sidewalk was defective in this, to wit: That at said date there was, and for a long time prior thereto had been, loose and broken planks and holes in, upon and along said sidewalk, and that said loose and broken planks and holes had been permitted and suffered by appellant to be out of repair, and so remain and continue, etc. We hold that under this averment it was competent to show the condition of the stringers. If the stringers were in such condition that they would not hold nails and had been in this condition for a length of time sufficient for the appellant to know it, such fact was competent to go to the jury as tending to prove the averment that there was and for a long time prior thereto had been loose and broken planks and holes in, upon and along said sidewalk, and that they had been permitted and suffered by the appellant.

Bartels says: "Sidewalk was laid on stringers; sidewalk was in poor condition; stringers were all rotten—would not hold a nail; that this was the condition of the walk prior to June 5, 1888, and this condition of things remained until appellee was hurt." Flynn says: "This walk was a little poor all over, loose boards, a little rotten. This was before accident, might have been two or three weeks, might have been two months." Patchen says: "Had been about these premises before this accident; have stumbled over this plank two or three times before; that it never flew up before—this was about two or three weeks before the accident."

It is further insisted by counsel for appellant that the court erred in modifying the fifth and seventh of appellant's instructions. By the fifth instruction, the court was asked to instruct that no damages were recoverable as for a permanent injury, if the jury believe from the evidence that the plaintiff's *neglect to promptly employ competent medical treatment for her injury or her* disobedience of proper directions as to the care of her injured arm, given her by her medical adviser, had caused her injury to assume such character of permanency.

This instruction as given omitted the italicized words.

We hold that the modification was proper. It was not

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absolutely the duty of appellee to promptly employ medical treatment for her injury. It was only her duty to do as a prudent person would do under similar circumstances. This instruction as asked made it appellee's absolute duty to promptly employ competent medical treatment for her injury, and if her neglect to so employ had caused her injury to assume such character of permanency as it otherwise would not have had, as to such injury she could not recover. Thus ignoring the rule as stated, *supra*.

The seventh instruction as asked and given, stated the law in favor of appellant too strongly. By it, even as amended, appellee was required absolutely to employ a physician if she had the ability to do so, even though the jury may have believed that prudent persons would not have done so under like circumstances.

The rule of law in this respect should have been distinctly stated to the jury. The Toledo, Wabash & Western Railroad Co. v. David Eddy, 72 Ill. 140. It is also insisted that the damages are excessive. There is evidence to support this verdict and we can not say it is manifestly against the weight of the evidence. Bush v. Kindred, 20 Ill. 93; Goodell v. Woodruff, 20 Ill. 191; French v. Lowry, 19 Ill. 158. We are satisfied with the law as given to the jury and with their verdict.

Judgment affirmed.

 LESTER P. WOOD

v.

WILLIAM H. LOOMIS.

Sales — Possession Retained by Vendor — Fraud — What Constitutes Change of Possession—Replevin.

1. An absolute sale of personal property, where the possession is permitted to remain with the vendor, is fraudulent *per se* and void as to creditors and purchasers.

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2. To constitute a change of possession there must not only be a delivery to the vendee but a continuing possession by him.

3. In an action of replevin by the vendee of personal property against an officer who holds under a levy upon execution against the vendor, it is *held*: That there was no substantial change in possession, and that the circumstances indicate fraud in fact and in law.

[Opinion filed December 11, 1886.]

APPEAL from the Circuit Court of DeKalb County; the Hon. CHARLES KELLUM, Judge, presiding.

Messrs. D. J. CARNES and G. H. DENTON, for appellant.

Messrs. JONES & BISHOP, for appellee.

WELCH, J. This was an action of replevin brought by the appellee against the appellant, Lester P. Wood, Sheriff of DeKalb County, who had taken the property in controversy (a horse, buggy and harness), in the possession of William Loomis, the father of appellee, on an execution against the said William Loomis. The case was tried in Justice and Circuit Courts and verdict and judgment rendered for appellee. The official capacity of the appellant, the judgment and execution against William Loomis, Sr., that he took the property while in the possession of William Loomis, Sr., and that the judgment and levy were subsequent to the bill of sale of the property from William Loomis, Sr., to the appellee, and prior to the commencement of this suit, was admitted. It was also admitted that there was a proper demand made by the appellee and a refusal by the appellant to deliver the possession of the property before the commencement of this suit. The evidence shows that on October 9, 1884, appellee took an absolute bill of sale of the property in question of his father, William Loomis, Sr., indorsing on a note held by him on his father the sum of \$150, the purchase price of the property. At the time the bill of sale was given, William Loomis, Sr., said he would like to keep the property, and the appellee said, if he would take care of the property he did not want to use it and

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he could keep it. The property was left with William Loomis, Sr. The appellee and his father were living on the same lot; there was only one barn for the two houses, and the barn was in the possession of and used by appellee's father. The property had been kept in the barn prior to the making of the bill of sale and was kept there subsequently to the time of the levy of the execution thereon, except the horse, which was in the possession of appellee for a few days at Blackberry. The appellee states that after the sale he hitched up the rig and took his wife out riding. The rig was returned by him to his father. On the 21st of October, 1884, appellee moved to Blackberry and used the horse in moving, and did not take the harness and buggy. The horse was returned to his father in a few days and his father had been using the horse, harness and buggy all the time since the bill of sale except the time that the appellee had the horse at Blackberry. Appellee also states that he had owned other horses since the purchase of this one from his father; that he had bought two last spring before this execution was levied, and had bought a carriage and harness. The evidence shows that prior to the making of the bill of sale appellee was in the habit of driving the horse, and whether he drove him more before than after the bill of sale is uncertain. The property was left in possession of the father and he was to use it for its keeping.

We hold that the possession of appellee was only temporary and was not inconsistent with the continued ownership and possession of the father. There was no substantial change of possession. The circumstances surrounding this case seem to indicate fraud in fact as well as in law. Chief Justice Sheldon, in *Tickner v. McClelland et al.*, 84 Ill. 474, says: "The policy of the law in this State will not permit the owner of personal property to sell it and continue in the possession of it. Possession being one of the strongest evidences of title to personal property, if the real ownership is suffered to be in one and the apparent ownership in another, the latter gains credit as owner and is enabled to practice deceit upon mankind. It is the well established doctrine of this court that an

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absolute sale of personal property where the possession is permitted to remain with the vendor is fraudulent *per se* and void as to creditors and purchasers." "On a sale of personal property by a debtor there must be a real permanent delivery and change of possession to enable the purchaser to hold the same against an officer levying an execution upon it for the debt of the vendor." *Reuben Allen v. Charles M. Carr*, 85 Ill. 388; *Thornton v. Davenport*, 1 Scam. 296; *Thompson v. Yeck*, 21 Ill. 73. As to what constitutes a change of possession, *Bump on Fraudulent Conveyances*, 133, says: "It is not sufficient that a vendor gives to the vendee a delivery which may be symbolical or a temporary delivery and then takes the articles back into his own possession and keeps and uses them just the same as he did before. This is not the possession which the rule requires. There must not only be delivery but a continuing possession. This possession must be continuous, not taken to be surrendered back again, not formal but substantial." 134, *supra*. The rule announced in *Brown v. Riley*, 22 Ill. 45-52, has no application to the facts of this case. In that case the loan by the purchaser to the seller was for a temporary purpose. In this case it was not a mere temporary borrowing by the vendor, but a continuous possession and use. In view of what we have said and in the light of the authorities, *supra*, the court erred in overruling appellant's motion to set aside the verdict and grant a new trial.

Judgment reversed, cause remanded and venire de novo awarded.

CHARLES NIMMO

V.

R. P. JACKMAN ET AL.

Action for Damages for Removing Structure from Race-way—Evidence—Judicial Notice—Authority of Agents of Corporation—Possession as Evidence.

1. In an action to recover damages for removing a certain structure from a race-way which crosses plaintiff's lot, it is *held*: That the evidence is ample

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to show that the Elgin Hydraulic Company was the owner of the race-way and had the right to remove obstructions therefrom; that the act incorporating said company being a public act, the courts are bound to take judicial notice of its incorporation; that the plaintiff admitted the incorporation of said company by making it a party defendant; that the evidence shows that the directors of the company, a portion of the defendants, acted in pursuance of the request and order of the company; that no former resolution of the board of directors was necessary to authorize such work; and that the evidence that the structure removed was an obstruction sufficiently supports the finding of the court below.

2. Possession itself, as to either personal or real property, as against one who can show no title, is evidence of ownership.

[Opinion filed December 11, 1886.]

APPEAL from the Circuit Court of Kane County ; the Hon. CHARLES KELLUM, Judge, presiding.

Mr. FRANK CROSBY, for appellant.

Mr. R. N. BOTSFORD, for appellees.

LACEY, J. This was an action of trespass *quare clausum fregit* by appellant against appellees and the Elgin Hydraulic Company in breaking and entering appellant's close; cutting, pulling down, damaging and removing certain posts, beams and timbers belonging to the appellant, forming support and rest for certain building of appellant of the value of \$200, etc., *ad damnum*, \$1,000.

Appellees and the Elgin Hydraulic Company pleaded, 1st, Not guilty; 2d, The appellees plead justification as officers, agents and servants of the Elgin Hydraulic Company which was in use, enjoyment and possession of a race-way conveying water from a dam across Fox River for power for machinery of the company's members in mills on said race-way which passed over and upon the *locus in quo*, which use, etc., was paramount to any right of appellant secured by conveyance or grant, but reserved therein to the said company; avers that the posts, etc., obstructed and interfered with the free use and enjoyment of the said water and race-way by said company, and that appellees pulled down and removed so much of them as was neces-

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sary, as they had a lawful right to do, doing no more damage than was necessary.

The third plea was the same and averred in lieu of ownership the Statute of Limitations of twenty years possession and enjoyment of the race-way, etc.

On the hearing the suit was dismissed as to the Elgin Hydraulic Company by appellant. A jury was waived and the cause tried by the court which found in favor of appellees and gave judgment against appellant for costs, who brings the case to this court by appeal.

It is denied by appellant that the Elgin Hydraulic Company had any right in the premises; also that there is any sufficient evidence in the record to show that appellees were the officers of the company, or that they were directed by the company to do the work of removing appellant's structure from the race-way.

Appellant further claims that there was no proof of the corporate existence of such company. It is also claimed that the evidence failed to establish the fact that the structure erected in the race-way was of such a nature as to "obstruct and prevent the free and uninterrupted use of said race-way so that the company did not and could not enjoy the same as it had a right to."

It appears that the appellant was the owner of the lot through which the race-way in question ran, and the structure which he built was erected by him, and consisted of a timber foundation over the race-way covered with plank and for showing agricultural implements, and was removed by appellees. The structure rested on upright posts which were placed on sills in the bottom of the race and fastened together by braces running up and down the stream but not across.

As to the rights of the Elgin Hydraulic Company in and to the race-way, it appears that the appellant owned and possessed the lot in question through which the race ran, by virtue of a deed dated February 1, 1875, from the Fox River Manufacturing Company, grantors, to him, which contained this reservation, after the granting clause in the deed, to-wit: "Excepting and reserving the right of passage for water in the race across

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the said premises of not less than forty feet on the clear without obstruction, and the right to go or enter upon said race at any time to make all necessary repairs. The said second party (appellant) shall have the right to erect abutments on which to erect a building in such a manner as not to obstruct the flow of water." The Elgin Hydraulic Company it appears, took possession of this race in 1865 or 1866, and was in possession and control of it at the time of the alleged trespass.

We think that the evidence is ample to show that the Elgin Hydraulic Company was the owner of this race-way or right which was reserved in the appellant's deed. Appellant certainly was not the owner, and the proof shows that the Hydraulic Company was in possession, and had for many years been in actual control and enjoyment of the privilege reserved in the deed. Possession itself as to either personal or real property as against one who can show no title, is evidence of ownership. Possession by the Elgin Hydraulic Company of this race was at least *prima facie* evidence of ownership, so far at least as was granted by its charter and there was no rebutting evidence. Upon this point the court was fully justified in finding that the Elgin Hydraulic Company was the rightful possessor and had a right to remove obstructions from the race-way. The act of the Legislature which incorporated the Elgin Hydraulic Company is declared by the act itself to be a public act, hence all courts must take judicial notice of it. See Vol. 2, Session Laws 1867, page 88.

By that act it appears that the corporation was created for the special purpose of keeping the race-way in repair, has exclusive charge of it for such purpose, was given the power to raise money therefor and was given the right to sue and be sued. *Elgin Hydraulic Company v. The City of Elgin*, 74 Ill. 433. The proof showed that the company was organized, had its officers chosen and was exercising the functions and powers granted to it by the Legislature and had been for many years. Aside from this, the appellant admitted the corporate existence of the company by bringing this suit against it.

By the third section of the charter three directors are pro-

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vided for who are to manage the affairs of the company. It appears from the evidence that the three directors, a portion of appellees, Jackman, Richards and Kizer, were present and ordered the work done, so that there is abundant evidence that appellees were acting in pursuance of the request and order of the company.

No formal resolution of the board of directors authorizing such work is needed. Upon the objection made by the appellant that the evidence was not sufficient to sustain the finding of the court on the question of the structure removed, having been an obstruction to the free use of the race-way, we can only say that the evidence on this point was conflicting, there being abundant evidence to support the finding. And we see no just ground to disturb the finding of the court on that ground.

Perceiving no error in the record the judgment of the court below is affirmed.

Judgment affirmed.

JOHN DAVIDSON AND RICHARD REARDON, IMPL'D, ETC.,
V.
THOMAS T. SPRAGUE.

Trespass—Action for Damages for Flooding Plaintiff's Land—Evidence—Review of—Practice—Trial by Court—Effect of Finding.

1. When a jury is waived and the cause is tried by the court, the finding is entitled to a like consideration as the verdict of a jury found under like circumstances.

2. In an action of trespass to recover damages for flooding plaintiff's land by means of a defective tile drain, it is *held*: That the appellants are not shown by the evidence to have been privy to the act of extending a certain drain made by them, said extension which caused the injury complained of having been made by the other defendant; and that the appellants had a right to assume that the other defendant would carry out his offer to take care of the water from their drain in a proper manner and are not liable for his failure so to do.

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[Opinion filed December 11, 1886.]

APPEAL from the Circuit Court of Will County; the Hon. CHARLES BLANCHARD, Judge, presiding.

Messrs. HALEY & O'DONNELL, for appellants.

Lord had a right to drain his farm by ditches, increasing the flow of the water, and thereby redeem it and render it fit for agricultural purposes. His land lay high above the river bottom. This ravine was lower than the rest of the land. He had a right to drain into it. *Peck v. Herrington*, 109 Ill. 611.

The Commissioners would have the same right to improve the highway that a private owner would have to improve his own land. *Nevins v. City of Peoria*, 41 Ill. 502; *Palmer v. O'Donnell*, 15 Ill. App. 324.

In actions *ex delicto* the evidence must apply to all the defendants. Evidence affecting one alone is not competent, and any element of damages for which one alone is responsible should not enter into the judgment. *Smith v. Wunderlich*, 70 Ill. 426.

The fact that the injury complained of is the remote result of the act of appellants or that it would not have occurred but for their act, is not enough, if some other cause intervened which is the proximate cause of the injury. *Wood, etc., Association v. Dubuque*, 30 Iowa, 176.

When the Commissioners with Lord's permission terminated this drain at the hedge fence, and left the water to flow thence south on Lord's land to the creek, can they be held to have intended that as a proximate result of their act Lord would direct this water and drain it across forty acres of land upon which crops grew, to the ravine? We challenge an inspection of the record for one word of evidence connecting them with the construction of this latter drain. The acts done by the Commissioners were not trespasses. They were lawful, and even in cases of trespass the rule contended for uniformly applies. *Cox v. Burbridge*, 13 C. B. 430.

There must be an immediate and natural relation between the act complained of and the injury, *without the intervention*

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of other independent cases, or the damages will be too remote. Rucker v. Athens Mfg. Co., 54 Ga. 84.

MESSRS. E. C. HAGAR, FLANDERS & SHUTTS and A. O. MARSHALL, for appellee.

The evidence, as a whole, discloses that the defendant changed the natural outlet of his pond or lake from a westerly to a northeasterly course by a cut of eleven feet and thereby changed its natural outlet, precipitating the water upon appellee's land, which could not have happened but for the act of the defendants in excavating this ditch.

The defendants in this case are jointly and severally liable for all damages resulting from the construction of this ditch. Tearney v. Smith, 86 Ill. 391.

LACEY, J. The appellee sued appellants in an action of trespass on the case, charging as the grounds of his action that appellants wrongfully caused to be dug a certain ditch or tile drain near his land in so careless and improper a manner that large quantities of surface water flowed from the ditch down to and upon the lands of the appellee, rendering them less fit for use and occupation than theretofore by reason whereof he was damaged. All the defendants were served with summons, and the appellants pleaded not guilty, and the other defendant, Lord, having left the State, made no defense, and default was entered against him. A jury was waived and the cause was tried by the court and appellants found guilty, and the court assessed appellee's damages at \$50, for which judgment was duly rendered.

The appellants claim as ground of reversal that, firstly, the appellee's land was the servient estate to that sought to be drained by appellants, and that they drained their land as they lawfully might do, into an open ravine, which carried the water upon the land of appellee, and cite Peck v. Herrington, 109 Ill. 611, 619; Nevins v. Peoria, 41 Ill. 502, and Palmer v. O'Donnell, 15 Ill. App. 324, in support of their position.

Secondly, appellants maintain that whatever damage may have been done to the appellee by the flowage of water upon

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his land, was not caused by them directly, but was caused by the wrongful acts of their co-defendant, Lord, in which acts they did not participate directly or indirectly. That the acts done by them were only the remote cause of the drainage, and that they are in no wise legally responsible to appellee for his injuries, if he received any.

These are the points upon which we are called to pass in this case.

The facts in the case are very little disputed and seem to be clear, and as the case was tried by the court, and no proposition of law was asked to be held by the court, the rightfulness or wrongfulness of the finding of the court must be passed upon by us as a question of the weight of evidence.

But in passing upon the question of fact it will be necessary also to keep in mind the law governing in a case like this, so that we may be able to see the bearing the evidence may have, at the same time giving the finding of the court below the same consideration that the verdict of the jury would be entitled to under like circumstances.

As to the first point raised, as there is in fact no distinctive law question raised, we can not say that the weight of the evidence would so far preponderate in appellants' favor as that the verdict should be set aside. We can not say that it is manifest the water from the pond drained would have come through the ridge cut by the drain in question in a state of nature as seems to be contended by appellants.

But as we will hereafter show, that may be an immaterial question and we will not pursue it farther.

The situation of the premises are about as follows, as near as we can gather it from the evidence. The course of the Des Plaines River at the point in question is nearly north and south. West of the river extend the river bottoms to the bluffs; on these bottoms is what is known as the appellee's pasture and stone quarry, on which the damage is said to have been done by the increased flow of water caused by appellants' ditches. The bottom is bordered on the west by the bluff, some thirty feet high, and along the edge of this bluff runs the Joliet and Chicago wagon road. On the west side of this

road, fronting east and overlooking the river bottom, are Lord's house and barns, the barns and cow-yard lying south of the house. A ravine begins in Lord's field back of his house, runs south, turns the southwest corner of his barn-yard, and then runs easterly across the wagon road under a high stone culvert and empties into the river bottoms and on the land of appellee. West of this road and barn-yard lies a forty-acre piece of tilled land, bordered on the west by a hedge fence in which there is a gap. This gap in the hedge fence was the terminus of the tile drain cut by the order of appellants. The gap spoken of is southwest from Lord's barn-yard and ravine nearly forty rods.

The Joliet and Chicago road follows the bluff, though not in a direct line, and cuts section twenty-seven so that at Lord's house the road is about forty rods from the hedge fence, which fence is on the east line of the southwest quarter of section twenty-seven. It is on the half-section line. Northwest from this gap in the fence and on the northwest quarter of section twenty-seven was a large pond, beginning near the south line of the northwest quarter of section twenty-seven and extending north and turning west and covering the highway between sections twenty-seven and twenty-eight. Another and different highway from the first is mentioned; south of the south end of this pond and about the line between the southwest quarter and the northwest quarter is a sharp, narrow ridge of land several feet higher than the pond. This pond covered five or six acres and had rendered the west road impassable for many years. The defendant owned the west half of section twenty-seven, on which the pond and ridge were situate, and also the forty acres east of the hedge fence extending to his house on the Joliet and Chicago road. The appellants, John Davidson, Richard Reardan and Robert Goudy, were the Highway Commissioners of the town. In 1881 the above named Commissioners of Highways of Du Page Township desiring to drain the said west road were told by Lord if they would lay a tile southwesterly from the pond to this narrow ridge to the gap in the hedge fence above mentioned, he would take care of the water at that point. In pursuance of the under-

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standing the Commissioners laid said tile from the pond through this ridge to the gap in the fence, a distance of some 200 rods, at a cost of \$200.

The tile emptied at the gap in the hedge fence into a trough placed there under the end of the tile. The water then ran there for some time, draining the pond as the evidence shows, and the overflow of the trough ran south along the hedge fence to a school house some distance away and into a depression that carried it into the Lilly Cache River and thence into the Du Page River, and the water did not run onto the appellee's land at all.

Afterward the defendant Lord cut a ditch and laid a tile drain connecting with this tile at said gap in the hedge fence and carried it from that point east and a little north across the forty-acre tract mentioned and emptied the water into said ravine at the barn yard, where it was carried down the ravine across the Joliet and Chicago road and fell down the bluff on to the river bottom and ran upon appellee's land, and for the damages occasioned by this overflow this suit is brought.

Had it not been for the tile drain laid by Lord without any privity or encouragement on the part of appellants, this drainage, as clearly appears from the evidence, as we think, would not have occurred.

When the tile drain had been completed no damage had been done and nothing done by means of which any damage could accrue to appellee; up to that point no cause of action could accrue to appellee. Unless appellants were in some way privy to the act of extending the drain no fault could in any sense be attributed to them.

The direct cause of the damage was the extension of the drain by Lord. The fact that Lord told appellants that he would take care of the water at the hedge fence could not be construed into proof that Lord agreed to take it in the course he did. It would rather be supposed that the latter would take it down the hedge fence where it naturally ran and where it would do no damage to any one, than that he would take care of it in such a manner as to injure the appellee. The appellants neither aided, encouraged, nor advised Lord to dig the ditch

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as he did. They did not know that he contemplated it. That the water ran off south from the point of the gap in the hedge fence and did not run upon appellee's land appears to be abundantly established by the testimony of appellant Davidson, Peter Ward, Kirkham, S. J. Williams and Charles Found.

The appellee claims in his brief that in consequence of the agreement that Lord would take care of the water at the hedge fence they were equally liable with Lord. That it was their duty to see that Lord carried out the agreement so as not to injure appellee. We think this is not a legitimate deduction from the facts proven.

It made no difference to appellants where Lord took the water. After their tile was laid to the hedge fence the road was perfectly drained and they had no need for the extension of the tile drain. It was not at their request or even for their benefit that it was extended. It was wholly for Lord's benefit. And the fact that the digging of the ditch by appellant gave Lord an opportunity to do mischief could in no legal sense make their acts the proximate cause of the injury. Lord's act was the cause, not theirs. We find no evidence in the record to show that the water from the pond at the west road could have reached appellee's land without the Lord tile drain. When the witnesses for appellee speak of the water from the pond running onto his land they all appear to have in mind the fact of the existence of the Lord drain as well as the other.

The evidence fails to connect appellant with acts that caused the damage to appellee's land, and for this reason the judgment of the court below is reversed and the cause remanded.

Reversed and remanded.

 Stewart v. Fellows.

EZRA H. STEWART ET AL.

v.

'FRANK FELLOWS ET AL.

21	618
111	584

Equitable Mortgage—Evidence—Decree Sustained.

Upon appeal from a decree in equity, declaring a lien in the nature of an equitable mortgage on a lot in favor of certain executors, it is *held*: That the evidence though conflicting supports the decree, the evidence of one of the appellants being untrustworthy because contradicted by statements made by him under oath in certain collateral proceedings.

[Opinion filed December 11, 1886.]

APPEAL from the Circuit Court of Will County.

MESSRS. HALEY & O'DONNELL, for appellants.

MESSRS. OLIN & PHELPS, for appellees.

LACEY, J. On October 12, 1870, the appellant, Ezra H. Stewart, entered into a contract of purchase at vendue with one David Richards, as vendor, for a deed of conveyance for S. $\frac{1}{2}$ lot 8 in Richards' Subdivision of blocks 13 and 14 of Canal Trustees' Subdivision of the W. $\frac{1}{2}$, Sec. No. 15, in Will County, for \$500, payable in four years after date with interest at ten per cent. per annum, payable annually, in which contract prompt payment was made an essential thereof, the said Stewart on the same day executing his promissory note therefor, due in four years from date. Thereupon Stewart took possession of the real estate and built a house on it. On February 7, 1873, the said Stewart assigned his duplicate contract of purchase to one George M. Leonard, eighteen or twenty months before the deed would be due thereon, which assignment was without any consideration, the said Leonard then holding the same in trust for Stewart.

On October 13, 1874, some eighteen months thereafter, said

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Richards and wife, for the express consideration of \$550, executed to said Leonard a deed of conveyance of the said real estate and delivered the said deed together with the said \$500 note given by said Stewart to said Richards for the purchase money.

It further appears that one E. C. Fellows advanced the \$550 to Leonard for the purpose of paying Richards for the real estate, unless the theory of appellants be true that Stewart himself furnished the money. It further appears that Leonard died before Fellows and devised to him this real estate or his interest in it, or in case his lien be paid off, the money in lieu thereof. Fellows afterward died and both the executors of said Leonard and Fellows are parties complainant and appellees herein. On June 2, 1875, said Leonard made and placed in escrow a deed for the said real estate in which deed the appellant Laura D. Stewart, wife of said Ezra D. Stewart, appeared as grantee, and placed it in the hands of one Wagener, book-keeper of the First National Bank of Joliet, to be delivered to the grantee named therein in case of his death. On September 6, 1875, said Leonard in his last illness had his will written and executed it, in and by which he devised the said real estate to his father-in-law, Fellows, but provided, in case Stewart would make the payment due on it within one year from the probate of the will, then Fellows should convey said real estate to Stewart. Leonard died September 7, 1875.

On April 8, 1876, the appellant Laura D. Stewart replevied the said deed from the possession of said bank where it was held in escrow and immediately had the same recorded.

Now, this suit is brought by bill in equity by appellees against appellants seeking to foreclose the equitable lien of Fellows' executors on the said real estate for the amount of the note and interest, claiming that the former hold an equitable mortgage on the said real estate for the amount of the note and interest. The court below found in favor of appellees, and decreed a lien on the real estate in question to the amount of \$1,048, the amount of the \$500 Richards note and interest, from which decree this appeal is taken. There are two other notes held by said Fellows in his lifetime now claimed by his

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executors to be a lien on said real estate, but we think not seriously, one for \$400, given by said Ezra H. Stewart to him December 30, 1871, and one for \$80, given by same party June 30, 1872. Stewart contends that he furnished the money to Leonard with which the latter paid Richards for the real estate in question, and that Leonard was a mere accommodation holder of the title for the benefit of Stewart, and he points to the directions accompanying the deposit of the deed with the bank in escrow as strong, if not conclusive, proof that his claim is correct, and that nothing remained due on the purchase price of the land. On the proper determination of this contention between the parties the decision in this case hinges.

If Stewart furnished this money to Leonard to pay off the Richards claim, that would forever end the matter; but on the other hand, if Leonard furnished the money, either his own or Fellows', and paid it to Richards and took the note and received the deed from the latter to himself, he would stand in the same relation to appellants as Richards did originally. It would not make any difference about the assignment of the contract by Stewart to him before that time. Whether he held the contract in trust or not he would still hold the real estate in trust for Stewart after it was deeded to him by Richards; but charged with the payment of the Richards note which he had taken up and the title could not be forced from him by any one until this lien was discharged. And if, under such circumstances, Laura D. got possession of the deed by replevin, the lien could not be divested by such means.

We have given the evidence careful consideration and have come to the conclusion that the court below committed no error in finding that the appellant did not furnish the money to Leonard to pay Richards, and that he had not paid the amount since.

We do not deem it necessary to examine the evidence in detail as it would serve no good purpose. But in general we may say the Richards note, taken up by Leonard and still in possession of appellants, is of itself *prima facie* evidence that it was still due and unpaid. This is supported also by the admissions of Stewart to various persons and other surround-

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ing circumstances. The main evidence relied on by appellants to rebut this evidence is the testimony of Stewart himself. According to his testimony, if it is entitled to credit, he furnished the money to Leonard to pay Richards for the land and Leonard furnished no money of his own.

But the weight of his evidence is very much impaired if not entirely destroyed by his various contradictory statements previously made by him under oath.

Leonard having died on September 7, 1875, appellant Ezra H. Stewart filed his cross-bill in the Circuit Court of Will County in chancery under oath, in which he avers that Leonard and not himself furnished the money to pay the Richards claim and that by agreement with Leonard the latter was to and did receive such deed for the real estate in question to hold as security for the money advanced. On May 31, 1878, he also filed his schedule of liabilities in bankruptcy under oath, in which he states that his indebtedness to the estates of Leonard and Fellows in the sum of \$1,400 for money loaned. This could not have been true unless the note in question was due as is claimed by appellees.

The suggestion that the appellant Ezra H. Stewart took these several oaths inadvertently we do not consider a satisfactory explanation. We can give his testimony but little if any credit, not enough to overcome that produced by appellees even when coupled with the other circumstances favoring appellants' side of the case.

Finding no error in the record the decree of the court below is affirmed.

Decree affirmed.

City of Joliet v. Helena Gerber.

CITY OF JOLIET

v.

HELENA GERBER.

21	622
96	1292
97	162

Municipal Corporations—Defective Sidewalks—Personal Injuries—Liability—Notice of Defects.

Where the evidence, in an action against a municipal corporation for injuries resulting from a defective sidewalk, fails to show that the municipal authorities had notice of the defect complained of, or such circumstances as that they in the exercise of a reasonable diligence should have known of such defect, the defendant will not be liable to the person injured.

[Opinion filed December 11, 1886.]

APPEAL from the Circuit Court of Will County; the Hon. DORRANCE DIBELL, Judge, presiding.

Mr. FRED. BENNITT, for appellant.

Mr. J. L. O'DONNELL, for appellee.

Where a sidewalk is in such a condition merely by reason of age or decay that it is likely to be dangerous, and a plank therein causes an accident, no knowledge on the part of the city of the looseness of that particular plank need be shown. The city will be chargeable with knowledge of its general condition. *Weisenburg v. City of Appleton*, 26 Wis. 56; *Sherwood v. Dist. Columbia*, 3 Mackey, 276.

WELCH, J. This was an action on the case brought by appellee against appellant to recover for injuries received by reason of a defective sidewalk. The declaration contains two counts averring that the appellant permitted and suffered a certain sidewalk on the west side of Chicago Street to become dangerous and that the appellee, in the exercise of ordinary care, while walking along and over said sidewalk fell through and upon said sidewalk and her right leg and right arm were

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injured. The second count avers that by reason of the injuries sustained she was hindered and prevented from prosecuting her ordinary avocations and suffered great anguish of body and mind to her damage, etc. Plea of not guilty. Trial, verdict for appellee assessing her damages at \$500. Motion for new trial, motion overruled, judgment on the verdict, from which this appeal is taken. Various errors are assigned. In the view we take of this case we shall only notice the sixth error assigned, that the verdict is contrary to the law and the evidence.

On the 25th day of June, 1884, as the appellee was returning home in front of Mr. Adler's lot at the northeast corner of Chicago and DeKalb Streets, she fell on the sidewalk. As she states, she "went down with the plank; just the right limb went down; the plank did not break." Her husband was walking a little in front of her; she and her husband and two children had passed over that walk going down town some two hours before. Her husband states that when they passed over it going down town "it was all right at that time." When he passed over the walk on his return home the plank, he states, must have been on the stringers; he saw nothing wrong with it; would have seen it certainly if it had been off the stringers; the plank was not broken; don't know how it got off the stringers and got down in the hole then. Mr. Martin, a witness for appellee, stated on his examination in chief that he knew the sidewalk; that some of the planks were loose prior to the appellee being hurt—he thinks it was in April or May that they were loose. On cross-examination he says: "I do not mean to say that in the month of May, 1884, that there were any loose planks there, did not notice them in particular."

Fanning, a witness for appellee, says: "Know the vacant lot on DeKalb and Chicago Streets. The sidewalk was repaired about a couple of years ago. I noticed it every time I walked down town, once or twice a day. There were places on Chicago Street worse, and some a good deal better. Some of the planks were not well secured. In 1884 there had been some planks loose. Could not say how long before June as to their

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being loose." On cross-examination he says: "I noticed only one loose; it was five or six planks from DeKalb Street; remembered that in June, 1884, there was first one plank five or six planks from the south end that was loose at one end."

Ryan, witness for appellant, says: "I know the sidewalk in front of the Adler lot; consider it in fair condition; passed over it from two to thirty times a week; before and up to the time Mrs. Gerber was hurt I passed over the walk four times a day; I did not see any loose planks in the walk."

Adler, witness for appellant, says: "My father owns the lot at the corner; always kept an eye on the walk and if there was need repaired the sidewalk; prior to the time Mrs. Gerber was hurt the condition was pretty good; I did not discover any loose planks; walked over it and saw it frequently." Collins, Furlong, Murphy and Murray state that they had passed over the sidewalk frequently and never saw anything the matter with it. This was all the evidence as to the condition of the walk. In our view the evidence fails to show that the city authorities had notice that the plank was loose, or that the condition of the sidewalk was such that in the exercise of a reasonable diligence it should have known that it was loose. Most of the witnesses had passed over the sidewalk daily and had not discovered any loose planks. The appellee and her husband had passed over it about two hours before the injury. He states he saw nothing wrong with it. Fanning says he saw one plank loose at one end in June, whether it was before or after the injury is not stated. No notice of any defect in the sidewalk was ever given to those of appellant's agents who had charge of streets and sidewalks. As held in *City of Chicago v. Margaret Murphy*, 84 Ill. 224, "When the evidence fails to show that the city authorities had notice that the plank was loose, or such circumstances as that they in the exercise of a reasonable diligence should have known it was loose, the city will not be liable to the person injured."

We hold that no recovery for the appellee could be sustained under the law and facts in this case.

Judgment reversed.

Agney v. Strohecker.

LABAN AGNEY
V.
JOHN STROHECKER.

Landlord and Tenant—Irregular Distress Warrant—Acquiescence—Instructions—Costs—Order to Return Property.

In a proceeding claimed to be by distress, it is *held*: That the distress warrant which authorized the bailiff to take the landlord's grain rent was an irregular and illegal way of compelling the tenant to make a division according to the lease as claimed by the landlord; that the proceedings under the warrant with the acquiescence of the defendant amount to full satisfaction of the plaintiff's claims; that the verdict for the defendant was proper; that said verdict should not be disturbed on account of any irregularities contained in the instructions; that the plaintiff was not entitled to costs; and that the court erred in ordering a return of the property taken under the pretended distress proceedings.

[Opinion filed December 11, 1886.]

APPEAL from the Circuit Court of Stephenson County; the Hon. WILLIAM BROWN, Judge, presiding.

Messrs. U. D. MEACHAM and LEONARD STOCKOPF, for appellant.

Messrs. JAMES I. NEFF and J. H. STEARNS, for appellee.

LACEY, J. This was a suit claimed to be a distress proceeding in favor of appellant against appellee, the verdict of the jury being in favor of appellee.

On the 28th day of May, 1884, appellant became the purchaser by warranty deed from the owner, Samuel Diffinbaugh, of a certain quarter section of land in said Stephenson County. At the time of said purchase the appellee was in possession of it and had been for a year at least under a certain contract for rent from Diffinbaugh, his lease continuing for the year 1884. The contract was verbal, and as testified to by

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John Diffinbaugh, agent for Samuel Diffinbaugh, was that appellee was to pay for the last year he lived on the place one-third of all the small grain and corn; no agreement as to the delivery of the grain except such corn as was wanted for feed was to be delivered when he, witness, wanted it. Appellee was for that year to have all the hay and apples and Diffinbaugh never had any potatoes. To the same effect is the testimony of Isaiah Best, who sold the farm to appellant, and as Best swears, appellant was to take the land and accept appellee as his tenant the same as Diffinbaugh had rented it to appellee.

Appellant however claimed and introduced evidence tending to show that appellee was to pay also one-half of the hay and apples and one-third of the potatoes. So far as it is necessary to sustain the verdict of the jury in this case, we are satisfied that the jury were justified in finding with appellee on his contention as to the terms of his renting from Diffinbaugh.

On the 9th of August, 1884, appellee threshed a portion of the small grain, oats and barley. It appears to be fairly established that by mutual consent between appellee and appellant the latter received and took away his full one-third portion of the grain threshed at that time, and this would amount to an attornment on the part of appellee to appellant of his allegiance as tenant to the latter. On the 20th of October, 1884, the appellee threshed a portion of the remainder of the small grain, when appellant's two boys went to receive the balance of the rent, but being refused admittance or the privilege of taking appellant's share they went back home and informed their father of the circumstances, and then went to town and got a distress warrant and gave it to Frederick Baker, the Deputy Sheriff, who went with the appellant and his two boys to the premises in question where the threshing was going on. Appellee said he did not want the Agneys to come on the place. Appellant said he had come for his share of the grain. Appellee said they had nothing there and inquired if Baker had a warrant and was told he had not. Then appellee said, "Drive them off the place." Appellee's boys then attacked the Agneys when Baker commanded the peace, and asked for the distress

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warrant which was handed him, and Baker read it to appellee, when the latter left the premises to go to Freeport. Before the distress was levied one load of oats and another load, part of oats and part of wheat, had been delivered to Jerome Fye at Elroy in appellee's name, but was afterward transferred to the Sheriff, Stewart. This was done by the order of Baker and appellee. There were sixty-five bushels of oats and twenty-seven bushels of wheat. The balance of the one-third of the grain was hauled in the name of Wm. Stewart, the Sheriff, in November. The first grain hauled to Elroy had been set apart by appellee as the one-third for rent, as far as the threshing had then proceeded, but intended for delivery to Diffinbaugh, the original landlord.

Appellant, at the time the distress warrant was read, told appellee that if he would let him have his share that he would pay all the costs.

The distress warrant issued in this case was peculiar. It was not a distress warrant under the statute authorizing the bailiff to distrain for the value of the portion of the grain coming to appellant by virtue of the lease, but was in the nature of an order to Baker, the bailiff, to force a division of the grain and to take and deliver to appellant his share claimed to be due him under the lease. The warrant authorized the bailiff to distrain the goods and chattels of appellee wherever found in the said county—that is to say, one-third of the wheat, oats, corn and potatoes, and one-half of the apples and hay grown on the premises in question. This was all there was of the warrant. The bailiff, then simply acting as intermediary, proceeded in the matter in exact accordance with the authority, and by arrangement with appellee selected out the one-third of the grain, and delivered it over to appellant. He, as he says, got his share of the wheat and oats and sold it. The forty acres of corn was divided by the bailiff and appellee and a man hired by the bailiff, but paid by appellee, to gather the corn and haul it to appellant who received his one-third of it and fed it up to his stock. One-half the hay was divided and set apart for appellant and fenced by appellee for the appellant at the bailiff's request, and a portion taken by the appellant, and the

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remainder might have been received if he had seen proper to take it. The potatoes were dug and one-third left on the ground for appellant as ordered by the bailiff which could have been taken if appellee had so desired, although they were allowed to rot. Appellant took a portion of the apples, all, as far as the evidence shows, that he desired. This was in no sense a proceeding under the statute to enforce the payment of the rent in money to the extent of the value of the grain rent reserved, but was an irregular and illegal way of compelling the appellee to make a division according to the terms of the lease as appellant claimed it—in other words to compel a specific performance. The appellee, although he was not compelled by law to submit to this manner of enforcing the payment of the rent, submitted and acquiesced in the demands of the appellant and his agents, the Sheriff and Deputy Sheriff, and delivered over to him all of the one-third of the small grain and corn which was received and enjoyed by him. We hold that this amounts to a full satisfaction of his claim so far as that portion of the rent goes; so far as the one-third of the potatoes and one-half the apples and hay are concerned, we think the jury were justified in finding that they were received also, and further if not received, that appellee did not owe that portion of the rent claimed in accordance with the lease with Diffinbaugh. It therefore appears that the claim of the appellant had become fully satisfied before the suit was called up for trial, and before the warrant had been charged so as to make it a proceeding in distress under the statute.

The jury no doubt found in rendering their verdict that the appellee owed no rent to appellant as far at least as the grain was concerned, and that it had been fully satisfied by being delivered to appellant and by his receiving it as such one-third and making use of it. That he had received full satisfaction of his claim and there was nothing remaining upon which he could rightfully claim a recovery. Having received full satisfaction for his claim for rent in the manner provided in the lease, he could not recover. Having treated the lease as still in force during all the irregular proceedings and claiming the right to receive the rent in kind, and so receiving it and mak-

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ing use of it, he can not now be allowed to recover for the value of it. The court allowed an amendment to be made in the warrant so as to allow a recovery for the value of the grain reserved as rent, on the terms that appellant pay all the costs of that term up to that time. His cause of action having been extinguished as we have shown, there was nothing left for the jury to do except to find a verdict for the appellee, which they did. The appellant takes exceptions to appellee's 1st, 2d, 3d, 4th, 5th, 6th and 7th given instructions. We have examined these instructions and think that while some of them may be erroneous on some questions of law and raise perhaps immaterial issues, yet the evidence is quite clear and without serious contradiction on the vital questions in the case, and we do not feel authorized to disturb the very just verdict in this case on such grounds. There was only the matter of costs involved and the appellant having by his acts in receiving the rent on the basis of the lease extinguished his cause of action, could not recover costs. *Skinner v. Jones*, 4 Scam. 193; *Baker v. Pratt*, 15 Ill. 568.

The court, however, committed one error, and that was in ordering the appellant to return the property distrained or taken under the pretended distress proceedings.

The distress proceedings were irregular in not conforming to the statute. The rent having been paid in full in kind by the consent of the appellee, he is not entitled to a return. There is nothing more to settle between these parties, and the appellant should not be compelled to return the property.

The order for the return of the property to appellee is therefore reversed and the judgment in all other respects affirmed.

The order of return of the court below being reversed, the costs of this court should be assessed against appellee, which is so done.

Judgment affirmed except order of return of property to appellee, which is reversed.

Lowe v. Ravens.

PETER V. LOWE

V.

HENRY RAVENS.

Practice—Conflict of Evidence—Exclusive Right of Jury.

1. Where the evidence is conflicting the jury have the exclusive right to pass upon and determine its weight and to find the facts.

2. This court will not interfere with the verdict of the jury when it is not clearly against the weight of the evidence and it does not appear to have been prompted by passion, prejudice, or misapprehension of the evidence.

[Opinion filed December 11, 1886.]

APPEAL from the Circuit Court of Kankakee County; the
HON. ALFRED SAMPLE, Judge, presiding.

Messrs. RICHARDSON BROS., for appellant.

Mr. C. A. LAKE, for appellee.

WELCH, J. This was an action of assumpsit brought by the appellee against the appellant to recover for extras and a balance claimed to be due him upon a contract with the appellant, whereby the appellee agreed to furnish the materials and erect for the appellant a house and barn, for which appellant was to pay him the sum of \$3,000. Appellant filed plea of general issue, set-off, and two special pleas setting up the contract and alleging a breach thereof by the appellee as to the quality of materials furnished and character of work done, and denying that appellee furnished any extra material or work. The trial of the issue resulted in a verdict and judgment for the appellee for the sum of \$400.

We have examined the evidence, and find it very conflicting. The jury under the law have the exclusive right to pass upon, and determine the weight of evidence and to find the

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facts. We must therefore leave the question of credibility and the worth of the evidence where the law has placed it, with the jury. We can not say that the verdict in this case is clearly against the weight of evidence, or that the verdict was prompted by passion, prejudice, or a misapprehension of the evidence. While we might have been better satisfied with the verdict the other way, yet under the law, that is not sufficient to justify us in disturbing it. *Morgan v. Ryerson*, 20 Ill. 343; *Martin v. Ehrenfels*, 24 Ill. 187; *Pulliam v. Ogle*, 27 Ill. 189; *Bishop v. Busse*, 69 Ill. 403; *Baysinger v. The People*, 115 Ill. 419. We find no error in the law as given by the court.

Judgment affirmed.

GERMAN FIRE INSURANCE COMPANY

V.

J. J. CARROW ET AL.

Fire Insurance—Location of Buildings—Change in Firm Insured—Six Months' Limitation—Adjustment as Waiver of Objections—Agency—Ratification—Instructions.

1. In an action upon a policy of insurance, wherein the defendant claims that the policy is void because the buildings insured were not entirely situated on the plaintiff's grounds, and because of a change in the firm insured, and that the action is barred by the six months' limitation in the policy contained, it is *held*: That these objections are met by an adjustment of the loss made by an independent adjuster whose acts were ratified by the defendant; that certain customary reservations if made in said settlement could not affect the waiver by the defendant of the six months' limitation clause of the policy; that defendant is estopped by the knowledge of its agent of the situation of the buildings and the change in the firm insured; and that certain objections to instructions can not avail the appellant.

2. The law does not favor clauses of limitations in policies of insurance. They are strictly construed and allowed to be readily waived.

[Opinion filed December 11, 1886.]

German Fire Ins. Co. v. Carrow.

APPEAL from the Circuit Court of Iroquois County; the Hon. ALFRED SAMPLE, Judge, presiding.

Messrs. STEVENS, LEE & HORTON and KAY & EUANS, for appellant.

French was not an agent within any definition of agency contained in the books. McLean was a mere soliciting agent; and the law is well settled that a party who is merely a soliciting agent for insurance can not bind the company by any contracts or agreements that he may make. He has nothing whatever to do with the adjustment of, or settlement for loss. *Covenant Mut. Benefit Ass'n v. Conway*, 10 Ill. App. 348.

An agent can only bind a company by acts done in the line in which he is usually acting. *Hoffman v. John Hancock Mut. L. Ins. Co.*, 5 Ins. L. J. 389.

The limitation clause was certainly a reasonable and proper one, and parties having insurance are supposed, in law, to know what their policy contains. The law supposes every person knows what provisions and conditions his policy contains. *Bishop v. Clay F. & M. Ins. Co.*, 11 Ins. L. J. 257; *Davis v. Mass. Mut. L. Ins. Co.*, 5 Ins. L. J. 736; *Fuller v. Madison Mut. Ins. Co.*, 4 Ins. L. J. 482.

The knowledge of an agent that the conditions of a policy have been violated, even though he is authorized to make contracts binding on the company, or even the knowledge of the officers of the company, will not waive the conditions of the policy or estop the company if defending against a breach of them. *English v. Franklin F. I. Co.*, 14 Ins. L. J. 877; *Bachelor v. Green I. Co.*, 12 Ins. L. J. 813.

Warranties, whether in an application which is made a warranty or in the policy itself, must be absolutely true; and the warranty fully kept, whether material to the risk or not. *Graham v. F. I. Co.*, 11 Ins. L. J. 64; *Commonwealth M. F. I. Co. v. Huntenger*, 10 Ins. L. J. 618.

Mr. T. B. HARRIS, for appellees.

McLean, the agent of the company, having full knowledge of the nature of the title of Carrow, Sewell & Co. to the prop-

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erty and the location of the building, and having himself, from his own knowledge, prepared the application, the policy is not rendered void by reason of the building extending on the railroad ground, even though that fact is not stated in the application or policy, there being no fraudulent misrepresentations. *Andes Ins. Co. v. Fish*, 71 Ill. 620; *Atlantic Ins. Co. v. Wright*, 22 Ill. 462, 473; *H. & M. Ins. Co. v. Corneck*, 24 Ill. 455, 461; *F. & M. Ins. Co. v. Chesnut*, 50 Ill. 111.

The renewal having been issued upon application of the new firm, and paid for by them on the advice of the agent of the company that such was the proper way to do, the agent having full knowledge of the change in the firm, the renewal constitutes a new and valid contract of insurance with the new firm. *Peoria F. & M. Ins. Co. v. Harvey*, 34 Ill. 46; *Hartford Fire Ins. Co. v. Walsh*, 54 Ill. 164.

And this is so whether the agent communicated the change or not; for a party who deals with an agent through whom he applies for and obtains a policy, has a right to presume that such material facts as are made known to him are made known to his principal, and when policies are issued with full knowledge of such facts the insured is to suffer no prejudice nor are the insurers to gain any advantage by insisting upon conditions which it would be dishonest to enforce. *May on Ins.* 2d Ed., 754; *Atlantic Ins. Co. v. Wright*, 22 Ill. 462; *Keith v. Globe Ins. Co.*, 52 Ill. 518; *Lycoming Ins. Co. v. Ward*, 90 Ill. 514; *Andes Ins. Co. v. Fish*, 71 Ill. 620.

The conditions in a policy which may work a forfeiture are to be most strictly construed against the company. *May on Ins.*, Sec. 175; *Aurora F. Ins. Co. v. Eddy*, 49 Ill. 106; *Commercial Ins. Co. v. Robinson*, 64 Ill. 266.

Courts will not require very stringent evidence in order to defeat its application. *May on Ins.*, Sec. 488; *Ripley v. Astor Ins. Co.*, 17 How. Pr. 444.

And waiver is question of fact for jury. *May on Ins.*, 488.

Mere silence may be evidence of waiver to go to jury. *Ibid.*, and authorities there cited.

And such a provision is waived by deterring assured from bringing suit by holding out reasonable hopes of adjustment

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of payment. Peoria M. & F. Ins. Co. v. Whitehall, 25 Ill. 466, 475; F. & M. Ins. Co. v. Chesnut, 50 Ill. 111; Derrick v. Lamar Ins. Co., 74 Ill. 404; Home Ins. Co. v. Meyer, 93 Ill. 271.

The adjustment having waived and abrogated the limitation condition in the policy, in the absence of fraud, is conclusive upon the company, and constitutes a cause of action upon which suit may be brought at any time within the statutory limitation. Illinois Mut. F. Ins. Co. v. Archdeacon, 82 Ill. 236; Farmers & M. Ins. Co. v. Chesnut, 50 Ill. 111.

LACEY, J. This suit was commenced June 6, 1885, in the Circuit Court by J. J. Carrow, Ezra Sewell, Wm. Potridge and John Hill, composing the firm of Carrow, Sewell & Company, upon a policy of insurance issued by appellant dated February 1, 1883. The policy covered an ice house owned by appellees. The policy was issued to A. B. Carrow, Sewell, Hill and Patterson February 1, 1883. A. B. Carrow sold and conveyed his interest in the property to J. J. Carrow without notice to the company, and on the 6th February, 1884, the company issued renewal receipts to Carrow, Sewell & Company continuing the policy in force for one year.

The property was destroyed by fire May 28, 1884. Wm. H. McLean, a resident of Iroquois County, secured the insurance. Only a small portion of the building extended beyond the lots owned by the insured on railroad grounds.

The agent who secured the insurance knew that a portion of the building extended over on railroad ground, and as the agent of the company, he examined the location and everything about the premises. The agent of the company was aware that the firm had been changed at the time of the renewal. The recovery in the court below was for \$927.33, the amount of the adjustment and interest as we suppose.

The appellant makes the following points for reversal:

1st. The policy is void because the buildings insured were not entirely situated on appellees' grounds, while in their application for insurance they represented them to be in fee simple, and because the title had changed by conveyance by A.

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B. Carrow of his interest to other members of the last named company before the renewal.

2d. The second and main cause urged by appellant for reversal is the bar of six months limitation contained in the policy of insurance, which limitation required the suit to be commenced within six months after the loss, which time had expired after the loss and before the suit was commenced.

As an answer to these objections appellees allege that the appellant, by its authorized agents whose acts were subsequently ratified by it, adjusted the loss with the appellees and fixed it at the sum of \$866.66 by agreement, while the latter claimed the loss sustained to be \$1,000, the full amount of the policy. This claim, if made out, would be a good answer to both the above objections raised by appellant. *F. & M. Ins. Co. v. Archdeacon*, 82 Ill. 236; *F. & M. Co. v. Chesnut*, 50 Ill. 114; *Andes Ins. Co. v. Fish*, 71 Ill. 620; *Peoria F. & M. Ins. Co. v. Harvey*, 34 Ill. 46.

Was the evidence sufficient on this point to sustain the verdict of the jury? We are inclined to think it was. By reference to the appellant's answer filed in the garnishee proceedings in favor of Carter et al., introduced in evidence, it will be seen the appellant expressly admits in its sworn answer that this adjustment was made. It says that it owed on this policy \$866.66, payable September 17, 1884, if the fire did not originate by any act, design or procurement on the part of the insured or any of them, or in consequence of any fraud or evil practice done or suffered by them, and nothing has been done by or with their privity or consent to vitiate the conditions of the said insurance or any of them so as to render said policy void.

It further admits that the loss was adjusted July 15, 1884. In his testimony Wagoner, the secretary of the appellant, testified that he "received the proof of loss that French, the adjusting agent, had made out on the 17th July, 1884." French did not use the blank sent to Holden. Our company, he says, "accepted it as a measure of damages under the policy, in a measure as an adjustment of the loss." In Wagoner's letter of May 30, 1885, to J. C. Turner, of Chicago, attorney for

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appellees, he says, while at the same time denying liability: "After the fire occurred Mr. Wm. B. French, who is an independent adjuster of losses, was requested to adjust this loss, and it was through him that we learned of the above irregularities," etc.

The proof shows by several witnesses that French did adjust this loss and agreed to that amount, and that he wrote to the company a letter concerning his action, which it did not produce on the trial. It might from all this evidence be reasonably inferred by the jury that this letter stated fully what he had done in the matter of adjustment, and that it was fully informed of all his acts and doings. Appellant's admissions show that it did accept the adjustment and settlement. Such notice was received and his acts ratified, and this was as effectual to bind the appellant as if he had been employed to make this adjustment in the first instance. But admitting that two or three customary reservations were made in such settlement in regard to points of defense for acts that may have been done by appellees, which they accepted in their proof of loss that French made out and which was sent to appellant, it could make no difference in principle as to the waiver by appellant of the six months limitation clause in the policy. Even in case of unconditional adjustment of the loss where the assured had made concealment of facts, like the one mentioned and accepted, a defense would on such grounds be allowable with or without the reservations, and the reservations would only confirm existing rights.

The fact remains that after the adjustment the contract was a new and different one from that contained in the policy, and founded on a valid consideration, the taking a less sum by the appellees than claimed and allowed by the policy. Under such circumstances only the general Statute of Limitations could be interposed as a defense. The law does not favor such clauses of limitation in policies of insurance, and they are strictly construed and are allowed to be readily waived. The settlement would be a valid consideration of waiver and the count in the declaration based on such is good. We think the jury was justified in finding from the evidence that there

was a complete waiver of the objections to recovery urged by appellant's counsel.

As to the points made in appellant's brief that the policy was void because the application for insurance did not correctly state the title of the property in the insured, a portion of the buildings being on railroad ground, and that the renewal was void because there had been a change in the firm, we think they are not well taken. Aside from these points being waived by the adjustment it will be seen that McLean, the agent receiving the application, was well aware of the situation of the ice buildings and knew that a portion of them was on railroad ground, and also himself prepared the application for the new firm for renewal well knowing of the change, and advised the renewal as it was made. These being the facts under the rule laid by the Supreme Court in *Andes Ins. Co. v. Fish*, 71 Ill. 620, *Peoria F. & M. Ins. Co. v. Harvey*, 34 Ill. 46, and other cases, this technical and inequitable defense falls to the ground. The appellant is estopped from insisting on such defenses, knowing the facts in the case as well as the insured at the times respectively of the application and renewal; it can not be heard to complain if the facts in the application were inaccurately stated nor of fraud in renewal. Under the clearly proven facts on the trial we think the objections urged to appellees' instructions can not avail. The 4th instruction being particularly complained of as being wrong in respect to the agency of French in making the adjustment, we have examined it in connection with the evidence and find that while it may not be literally correct in putting the question as though the agency of French existed in the first instance, it is in substance correct, as the acts of French in making the adjustment were subsequently ratified by the appellant, which, in law, amounts to the same as though he had been authorized in the first instance. And it could make no difference whether Holden, who delegated his authority to French, had full power to adjust loss in full, if the acts of French were ratified after he made a complete settlement, as the company by Wagoner, its agent, state was the case, which it also admitted in the answer in the garnishee proceedings. The

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objection is merely technical and without substance. After reviewing the whole case we have arrived at the conclusion that there is no substantial error in the record, and that substantial justice has been done.

The judgment is therefore affirmed.

Judgment affirmed.

AURELIA LEWIS
v.
CHARLES E. BARBER.

Confession of Judgment—Sufficiency of Cognovit—Fraud—Possession, Fraudulent as to Creditors—Estoppel—Instructions.

1. A confession of judgment is sufficient to authorize the clerk to enter up the judgment if the cognovit contains the words, "I can not deny."

2. An instruction which calls special attention to an isolated fact in the evidence thereby giving it undue prominence, is improper, but such error is not a sufficient cause for reversal where the defeated party was not thereby injured.

3. In an action of replevin against a Sheriff to recover property held by him under certain executions, it is *held*: That the possession of the son of the plaintiff was fraudulent as to creditors, and that the plaintiff is estopped from setting up a claim thereto.

[Opinion filed December 11, 1886.]

APPEAL from the Circuit Court of Iroquois County; the Hon. ALFRED SAMPLE, Judge, presiding.

Messrs. PAYSON & RAYMOND, for appellant.

The power to confess a judgment must be clearly given and strictly pursued or the judgment will not be sustained. *Keith v. Kellogg*, 97 Ill. 147; *Frye v. Jones*, 78 Ill. 627, 632; *Chase v. Dana*, 44 Ill. 262; *Roundy v. Hunt*, 24 Ill. 598; *Follansbee v. Scottish Am. Mortgage Co.*, 5 Ill. App. 18; *Batty v. Corwell*, 2 Johns. 48.

To say by a party sued that he can not deny the demand,

is in no sense a confession of judgment. *Elliott v. Daiber*, 42 Ill. 467.

The simple admission of a party that a particular claim produced against him is correct, is not a confession of judgment. *Campbell v. Randolph*, 13 Ill. 313.

The established practice in cases of confessions of judgments in courts of record requires the plaintiff to file a declaration, the warrant of attorney with proof of execution thereof and a plea of confession. *Roundy v. Hunt*, 24 Ill. 600; *Tucker v. Gill*, 61 Ill. 236.

A broad distinction is made in the adjudicated cases as to the force and effect of declarations and cognovits filed in term time and those filed in vacation. *Inglehart v. Chicago M. & F. Ins. Co.*, 35 Ill. 514; *Durham v. Brown*, 24 Ill. 93.

When filed in vacation the clerk must look to cognovit alone. His acts are purely ministerial. Without the exercise of judicial powers and functions the clerk could not have said in this case that the plaintiff was entitled to recover anything. *Tucker v. Gill*, 61 Ill. 236.

Messrs. KAY & EVANS, for appellee.

LACEY, J. The appellee was Sheriff and held two executions against Henry F. Lewis, the son of appellant, issued on judgments as follows: One in favor of Joseph Evans against H. F. Lewis and John Ruder dated December 4, 1883, for \$244.26; the second, in favor of Joseph Metzenbaugh against H. F. Lewis and Stephen Cissna, for \$125.20.

These judgments were confessed by an attorney at law in favor of plaintiff in execution in the Circuit Court in vacation, by virtue of a power of attorney contained in the notes.

The main point urged for reversal in this case is that the cognovit was not in due form and that the language of the confession was not broad enough to authorize the clerk to enter up judgment.

The language of the cognovit being the same in both cases, is as follows: "The defendants come and defend the wrong and injury when, etc., waive process and say they can not deny

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the action of the plaintiff, nor but that they undertook and promised in manner and form as the plaintiff hath complained, nor but that the plaintiff hath sustained damages on occasion of the non-performance of the several promises, etc., to the amount of \$ ———," the amount in each judgment.

The objection raised to this form of confession is that it does not expressly confess judgment; that for the attorney in his cognovit to say he can not deny the claim set out in the declaration in manner and form therein charged, as was done in the above cognovit, is not a confession. It is not explicit enough. *Elliott v. Daiber*, 42 Ill. 467, and *Campbell v. Randolph*, 13 Ill. 313, are cited as so holding. Whatever expressions may be contained in those opinions it will be observed that it was not the sufficiency of a cognovit that was in question, and we can not regard them as authority in this kind of a case. We are satisfied that the cognovits in question are sufficiently clear and explicit to authorize the clerk to enter up judgment. The form used is equivalent to an express confession; to say, "I can not deny" is one form of confession. This is the form of cognovit in general use for the confession of judgments, and it was recognized and held sufficient in *Keith v. Kellogg*, 97 Ill. 147. A form similar to the one in question was set out in full in the opinion and held by the court to be good; no one thought of questioning its sufficiency. We regard this as sufficient.

Another point made is that the verdict was manifestly contrary to the evidence, and that the judgment should be reversed for that reason. The proof tended to show that the possession of the property in question by H. F. Lewis was fraudulent as to creditors and that he was the absolute owner of a part or all of the property. As to the colt it is in proof that he purchased it at a public sale. The appellant claims to have purchased the property of her husband, Elisha Lewis, father of Henry F., in September, 1878, by bill of sale, or at least the property of which a portion of this is the increase. The evidence shows that Henry F. had all the property in possession on the large farm which he occupied long before that time, with a one-half undivided interest in all the

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personal and real property; that his father owned the other half. This half interest his father purchased and sold to appellant for a pre-existing debt, due from him to her. Henry continued to remain in possession of the same as before, claiming to own the property and getting credit on the strength of it. The appellant told her son after her purchase to remain there and "to get his living off the place if he could for himself and family." "He has a large family and his health is poor." It appears that appellant paid but little if any attention to the affairs of the place, but Henry went ahead, traded and dealt with the stock and treated it as his own and procured credit on being the apparent owner of it with no objection or interference by appellant until some of the debts were pressed for payment. Probably not until these security debts were pressed.

There is evidence going to show that at least at one time appellant stated in order to give her son credit, that he was the owner of one-half the personal property. We think there was evidence to justify the jury in finding that property was not absolutely that of Henry; that his possession as to creditors was fraudulent in law and the appellant estopped from setting up her claim to it as against these judgment creditors.

It appears that Henry's wife owned an undivided half of the real estate of the farm on which they lived and kept the stock with other, in suit, and it is complained that the instruction by the court to the jury in behalf of appellee that this was "a circumstance to be considered as to whether or not defendant in execution, H. F. Lewis, was the owner of the property levied" on, was error. Undoubtedly this was one of the circumstances of the surroundings that might properly be in evidence and be considered by the jury, but according to many decisions of the Supreme and this court, it is not proper to call the special attention of the jury to an isolated fact in the evidence and thereby give it undue prominence, but such error will not be sufficient cause for reversal where the court can see that the defeated party was not injured by such instruction. We think error in view of all the circumstances.

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is not of sufficient importance to justify reversal for that cause alone.

The judgment is therefore affirmed.

Judgment affirmed.

H. BAILEY & Co.

V.

THE VALLEY NATIONAL BANK.

21 642
71 485

Practice Act—Sec. 28—General Issue with Notice—Negotiable Instruments—Denial of Execution of Note—Failure of Consideration—Partnership—Set-off—Attachment—Service—Variance — Instructions — Nul Tiel Corporation.

1. In an action on two promissory notes purporting to have been made by the defendants as copartners, and assigned and indorsed to the plaintiffs, it is *held*: That there was no error in striking a notice of set-off from the files, the declaration not having been filed prior to the filing of said notice; that no defense special to one of the defendants was allowable; that there was no error in the refusal of the court to strike the amended affidavit and bond of attachment from the files; that the attachment being against but one of the defendants, he only could assign errors in the attachment proceedings; that the court properly refused to quash the attachment writ on account of the service; that the entry of default on attachment was proper, no notice of an attachment in aid being necessary where there has been service in the original cause; that there was no variance between the declaration and the larger note and indorsements thereon; that the plea did not put in issue the indorsements; that the plea of general issue and notice sworn to did not, under Sec. 28 of the Practice Act, put in issue the execution of the note; that evidence of partial failure of consideration was inadmissible under the notice of total failure of consideration; that said evidence was properly excluded although the evidence was not all in; and that the instruction as to the burden of proof that the plaintiff was a corporation was properly refused, as an issue of *nul tiel corporation* can not be raised by notice under the statute.

2. The execution of a note can only be denied by plea of *non est factum*, or *non assumpsit* verified.

3. Where the note is made by copartners and the plea of *non assumpsit* is verified by one partner it is good only as to him.

4. Where the general issue with notice is substituted for a special plea, the defense must be proved as stated in the notice.

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[Opinion filed December 11, 1886.]

APPEAL from the Circuit Court of Kankakee County.

Statement by WELCH, J. This was an action of assumpsit brought by the appellees against the appellants on the 29th of August, 1885, upon two promissory notes; one for the sum of \$450 purporting to be executed by the appellants payable to O. H. Queal, and by him assigned to the appellees; the other for the sum of \$1,500 purporting to be executed by the appellants payable to Kate E. Queal and H. S. Towle, adm'rs, etc., by them assigned to John H. Queal, and by him, under the name and style of J. H. Queal & Company, indorsed to the appellees.

There was service on Thomas C. McCulloch, one of the appellants, on the 2d of September, and on Hiram Bailey, the other appellant, on the 7th of September. On October the 9th the appellants placed on file a notice of set-off; November 11th attachment writ in aid of suit issued; November 21st the appellees filed their declaration with affidavit of merits, together with a stipulation that suit was upon the two promissory notes described in the declaration; December 1st appellants filed motion to quash the attachment writ; December 2d appellees filed motion to strike appellants' notice of set-off from the files, which motion was allowed, and appellants then and there excepted. Appellees were granted leave to amend affidavit and bond for attachment. An amended affidavit and bond in attachment was filed by the appellees. December 9th appellants filed plea of general issue and notice under the statute of the defense relied on verified. Appellee Bailey also filed his motion to strike affidavit for attachment from the files, and the bond filed December 9th for reasons assigned. One was, that the bond had no seal; the court allowed the seal to be affixed to the bond, and overruled appellant Bailey's motion. Appellants then moved the court to quash the service of attachment writ which was overruled. On January 10, 1886, appellant Bailey having filed no plea to the attachment, as required by the rules of

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court, was called and defaulted. On April 16th there was a trial, verdict, and judgment for appellees for the sum of \$2,148.90. Motion was made for new trial, motion overruled and appeal taken.

Messrs. STEPHEN R. MOORE and HARRISON LORING for appellants.

Mr. DANIEL H. PADDOCK, for appellee.

WELCH, J. In view of the numerous errors assigned we have deemed it important to set out each step taken in the case with particularity as to time. The first point insisted on by counsel for appellant is that the court erred in striking notice of set-off from the files. Under section 28 of the Practice Act "The defendant may plead as many matters of fact in several pleas as he may deem necessary to his defense, or may plead the general issue and give notice in writing under the name of the special matters intended to be relied on for a defense on the trial."

Section 29th of Act, *supra*: "The defendant in any action brought upon any contract or agreement, either expressed or implied, having claims or demands against the plaintiff in such action, may plead the same or give notice under the general issue, or under the plea of payment." Section 30, Act, *supra*: "When such plea or notice of set-off shall have been interposed, the plaintiff shall not be permitted to dismiss his suit." When and how can the defendant avail himself of a set-off? He has one of two methods. Special plea, or filing the general issue and giving notice under it. Appellants adopted neither. At the time of giving notice appellees had not filed their declaration. No plea or notice under it could be filed prior to the filing of the declaration.

Section 36 of Practice Act authorizes the plaintiff to file with his declaration an affidavit of merits. When this is done, if the defendant is a resident of the county in which the suit is brought, he shall file with his plea an affidavit of merits. An affidavit of merits was filed with the declaration in this

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case. Counsel for appellant claims that this section does not apply to the appellant Bailey; that he was a non-resident. The notice does not purport to be the notice of Bailey, but of both defendants. It is not pretended as a special defense for Bailey. No defense special to Bailey could have been allowed.

The claim of the appellee was based on partnership obligation; individual matters could not be brought in as off-sets to such claim. There was no error in striking the notice of set-off from the files.

Counsel for appellant insists the court erred in not striking the amended affidavit and bond of attachment from the files. This is a matter personal to Bailey as the attachment was against him alone. In the motion for new trial this was not made a ground for same, and no motion in arrest of judgment on the attachment was made. And in the errors assigned the only errors are assigned by the appellants. No error is assigned by Bailey individually, and only he can take exception to the attachment proceedings. Even conceding that the error had been assigned by Bailey we hold that there was no error in the ruling of the court thereon. *Ryan v. Driscoll*, 83 Ill. 415; *City of Chicago v. Gage*, 95 Ill. 593.

It is also insisted by counsel for appellant that the attachment writ should have been quashed on account of the service, and refers to the first affidavit. This affidavit was amended by order of the court. The property levied on was only the interest of H. Bailey. The return shows a levy upon "all the right, title and estate of Hiram Bailey to the following described property, being the property of H. Bailey & Co." The amended affidavit charges that Hiram Bailey was, at the time of swearing out the writ, a resident of the State of Florida, and that he had fraudulently conveyed his property to defeat his creditors. We do not consider this point well taken.

It is also insisted by counsel for appellants that the court erred in entering default against Hiram Bailey on the attachment for the reason that he was not served with the attachment writ, and there was no publication and no appearance by Bailey except as claimed for the purpose of a motion to strike

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affidavit from files. This was an attachment in aid of a suit at law. Bailey was served with process in that suit on the 7th day of September. Under Sec. 33 of the Attachment Law, "Upon the return of attachments issued in aid of actions pending, unless it shall appear that the defendant or defendants have been served with process in the original cause, notice of the pendency, etc., shall be given as required in cases of original attachment." No notice was necessary when there had been, as there was in this case, personal service in the original cause.

It is next insisted by counsel for appellant that the court erred in admitting in evidence the note for \$1,500. The objection made was that the note was not indorsed to the appellee. The declaration, after describing this note *in haec verba* and properly setting forth its legal effect, proceeds thus: "Kate E. Queal and Henry S. Towle, administrators of the estate of R. F. Queal, to whom or to whose order this note was payable, then and there indorsed the same in writing, by the name and style and description of Kate E. Queal and Henry S. Towle, administrators of the estate of R. F. Queal, and then and there ordered and appointed said sum of money mentioned in said promissory note to be paid to John H. Queal or order, and then and there delivered the same so indorsed to the said John H. Queal, and the said John H. Queal, to whom or to whose order the said note then and there became payable, and then and there was payable, then and there in writing indorsed said note in the name, style and description of J. H. Queal & Co., and then and there ordered and appointed said sum of money, mentioned in said promissory note, to be paid to the plaintiff (now appellee), and then and there delivered the same so indorsed to the said plaintiff."

The indorsement of the note offered in evidence is as follows: "Pay John H. Queal or order, Kate E. Queal, Henry S. Towle, administrators of the estate of R. F. Queal." "Pay to the Valley National Bank, of Des Moines, Iowa, or order. J. H. Queal & Co."

There was no variance between the allegations in the declaration and the note and the indorsements thereon. There was no plea denying the indorsement. The plea was general issue and notice thereunder of special defenses verified.

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Section 33 of Practice Act: "No person shall be permitted to deny, on trial, the execution or assignment of any instrument in writing, whether sealed or not, upon which any action may have been brought * * * unless the person so denying the same shall, if defendant, verify his plea by affidavit." The indorsement must be put in issue by plea verified. Even the plea of *non est factum* verified does not put in issue the indorsement. Shipley v. Carroll, 45 Ill. 285; Templeton v. Hayward, 65 Ill. 178; Walker v. Krebaum, 67 Ill. 252.

It is further insisted, "before the notes were introduced in evidence, proof of their execution must be offered." That under Sec. 28 of Practice Act, *supra*, the plea of general issue and notice sworn to, put the appellee on proof of the execution of the note. We hold not. The notice under the statute, as we construe it, only applies to cases where affirmative matter is introduced by defendants as a defense—in other words, confession and evidence.

The statute is in derogation of the common law, and must be strictly construed. We do not understand that the case of Hunt v. Weir, 29 Ill. 83, overrules the case of Burgwin v. Babcock, 11 Ill. 28, but re-affirms the rule as there announced, that the execution of a note can not be denied except by plea of *non est factum* or *non assumpsit*, verified. By filing notice instead of plea, the defendant assumes the burden of proof of what the notice alleges; even if it should be conceded, which we do not, that under a notice verified, an issue as to the execution of the notes could have been presented, so as to require proof of their execution.

The notice and affidavit in this case were insufficient. The affidavit as made by the appellant T. G. McCulloch, in which he says that defendants' defense, under their notice filed with the general issue, wherein they set forth that the notes sued on are not their notes nor the notes of said firm of H. Bailey & Co. and that the same were not delivered by the defendants to the payees thereof, is true as therein set forth. By reference to the notice they say they will further show that defendants never delivered said notes or either of them to the said

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payee nor consented that said Jenks should deliver said notes to them, or in any manner authorized said Jenks or any other person to deliver said notes or either of them to said payees thereof or to any other person. It will be perceived that this notice does not negative the idea that the delivery of the notes was not ratified after their delivery. The affidavit should have been a direct denial of the execution of the notes, or of their ratification after delivery as to the person making the affidavit, McCulloch. He could not testify for Bailey. A plea of *non assumpsit* verified by one partner is good only as to him. *Stevenson v. Farnsworth*, 7 Ill.; *Davis v. Scaritt*, 17 Ill. 202.

It is further insisted by counsel for appellant that the court erred in excluding defendants' evidence from the jury. If it should be conceded that the defendants had made proof to the extent as claimed by their counsel, yet the court would have been justified under the law in excluding it.

The rule of law is where a notice of general issue is substituted for a special plea the defense must be proved as stated in the notice. The record discloses a suit on two notes, one for \$450 payable to O. H. Queal and assigned to appellee, one of \$1,500 payable to Kate E. Queal and H. S. Towle, administrators, and by them assigned to John H. Queal and by him assigned to appellees.

The notice of special defense says that both these notes were delivered in *escrow* to Jenks for certain shares of stock that never were delivered, and that John H. Queal, the intermediate indorser on the \$1,500 note, knew all about it. They will prove also that John H. Queal, to whom said notes were indorsed by the payees, knew these facts when he took said notes; that he paid nothing for said notes, but took the same as a means of carrying out the scheme attempted to be made to defraud these defendants.

There was no claim of proof that the note for \$450 was delivered in *escrow* to Jenks, or that the same was without consideration.

There was no claim of proof that J. H. Queal, the intermediate indorser on the \$1,500 note had any knowledge of any-

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thing alleged by the appellants in their notice, that they would prove he had or that he paid no consideration for the note.

The notice as given in this case was a total failure of consideration. It can not be sustained by evidence of partial failure. *Burnop v. Cook*, 32 Ill. 168. The essential allegation in the notice in this case was a total failure of consideration of the notes, and knowledge thereof to J. H. Queal, the indorser, and that he paid no consideration therefor. There was no evidence as claimed, tending to prove either. *Poleman v. Johnson*, 84 Ill. 269; *Martin v. Chambers*, 84 Ill. 579.

It is, however, claimed by counsel for appellant that the court excluded the evidence before the evidence was all in. As we understand from this record there was no claim made or disclosed to the court that they had other evidence by which they could prove the failure of consideration of both notes and knowledge thereof to J. H. Queal, as charged in the notice, and that he paid no consideration therefor.

It is next insisted that the court erred in refusing to give an instruction asked by appellants that the burden of proof was on the appellee to prove that it is a corporation. An issue of *null tiel corporation* can not be raised by notice under the statute. It is a negative plea the effect and purport of which is to put the corporation on the proof that it was a corporation *de facto* or *de jure*.

The same reason exists as to the necessity of a plea as is given *supra*, as to the necessity of a plea of *non est factum*. We are satisfied with the rulings of the court on the other assignment of error. The judgment is affirmed.

Judgment affirmed.

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21	650
45	250

MICHAEL BYRNE

V.

ALFRED I. HARTSHORN.

Sales—Action to Recover for Lumber Alleged to have been Sold to Defendant and Delivered through a Contractor—Evidence—Question for Jury—Instructions.

In an action to recover the value of lumber alleged to have been sold to the defendant and delivered through the contractor, who was building him a house, it is *held*: That an instruction to the effect that the acceptance and presentation by the plaintiff of an order by the contractor on the defendant was *prima facie* evidence that the contractor and not the defendant was originally liable, was erroneous, being in effect in view of the evidence an instruction to disregard the evidence of the plaintiff and find for the defendant; that an instruction to give the plaintiff's evidence in regard to oral statements of the defendant special scrutiny, was erroneous; that an instruction not applicable to any evidence in the case should not have been given; and that if evidence to show that the defendant had paid the full contract price of the house to other parties was improperly admitted, the error can be corrected on a new trial.

[Opinion filed December 11, 1886.]

APPEAL from the Circuit Court of La Salle County; the Hon. CHARLES BLANCHARD, Judge, presiding.

Statement by LACEY, J. This was a suit brought by the appellant in December, 1883, to recover for a bill of lumber which he claimed to have sold to appellee and which was used by the latter in building his dwelling house, in the spring of 1882. The bill was for \$1,503.67.

Upon proper issues being joined the case was tried by a jury which found a verdict in favor of the appellee and this appeal is taken. The appellant on the trial swore that he sold the lumber to appellee by an agreement with him that the lumber was to be charged to him and to be sent to him at the order of one Lamb, who was a building contractor and had entered into a contract with appellee to build him a house and

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furnish the labor and materials for the sum of \$3,900. The appellee, however, contends that he had no such contract with appellant but that Lamb purchased the lumber of appellant on his own account and that he had nothing to do with the dealings between appellant and Lamb.

The appellant, to maintain the issues on his side, produced himself as a witness and his books of account, showing that the lumber was all charged to appellee at the time it was procured and not to Lamb. He also testified that he had an express agreement with appellee that the lumber was to be sold to him and charged to him at Lamb's order, and that the lumber was so sent. The contract with appellee was made in May, 1882, about the time the contract was let by appellee to Lamb to build the house and before any lumber was furnished. Appellant also produced witnesses in corroboration of his own testimony to show certain statements made by appellee in their presence. These witnesses are James V. Caughlin, S. S. Fairfield and D. A. Lamb. Fairfield, whose shop was across the street from Byrne's office, testified to having a conversation with appellee before the house was commenced and bid on the work himself.

Afterward he had a conversation with him about the letting of the contract and appellee told him that there was a man whose figures were \$300 or \$900 less than witness's. He (possibly a week afterward) heard a conversation between appellant and appellee back of appellant's office near the sidewalk; witness was going across to pick up some lumber from four to ten feet from them. They were talking about the lumber for the house. Appellee said "to send the lumber and he would pay for it or see it paid." Appellee said something about going on Lamb's bond. John W. Caughlin, appellant's bookkeeper at the time, heard a conversation between appellant and appellee in the former's office just after a conversation outside the office in June, 1882, in which appellee said to appellant, "as I am going to pay for the lumber I want good lumber;" and appellant replied, "Mr. Hartshorn, if there is a stick or board goes out there that ain't satisfactory send it back." Also witness presented the bill in suit to appellee

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for payment September 3, 1882, and told him the amount, and he said "Don't I want more than that?" I told him I didn't know that he would. "Well" says appellee, "that is all right, I will come up and see Mike."

And D. A. Lamb testified in behalf of appellant in rebuttal: "In early part of September, 1882, Hartshorn said to me that this lumber bill of Byrne's must be getting pretty large and asked me if I knew how much it was, and I told Hartshorn it was about \$1,500." Witness had another conversation with appellee after that about the cost of the work done on the house by witness, and appellee said to him, "There is that lumber bill of Byrne's of \$1,500; that must be paid."

The appellee denied on the witness stand that he had ever authorized appellant to let Lamb have lumber on his account. He also denied the conversation with Caughlin when the bill of appellant was presented for payment. Lamb didn't do much after September 9th, after the plastering went on. Appellee also denied the conversation with Lamb in the manner Lamb had testified to.

The appellee was corroborated by the testimony of one Horace W. Scholfield, who testified to having a conversation with appellant in regard to sending for the doors and blinds for the appellee's house, in presence of Caughlin, in which appellant said he would not furnish them; that "Lamb had got every dollar's worth of lumber on that job or any other unless he paid in advance." The evidence showed that appellant had accepted an order from D. A. Lamb, the contractor, on the appellee, about September 8, 1882, for \$1,503.67 for this lumber bill, and which appellee refused to accept or pay.

The above was substantially the case as it appeared before the jury, with the exception of some of the attending circumstances given in evidence.

Messrs. DUNCAN & O'CONNER, for appellant.

It is not for the court to instruct the jury in a case where the evidence is conflicting, or indeed in any case, as to what evidence is the strongest. The jury in a civil suit should find from the preponderance or greater weight of the evidence,

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and for such purpose they should ascertain the value of the evidence before them, and in so doing the interference or direction of the court is not required or allowed. The weight of the evidence is a matter with which the court is not in any manner concerned. *Frizelle v. Cole*, 42 Ill. 362; *Chittenden v. Evans*, 41 Ill. 251; *T., W. & W. R'y Co. v. Brooks*, 81 Ill. 245; *Hartley v. Lybarger*, 3 Ill. App. 524; *Straubher v. Mohler*, 80 Ill. 21; *Wright v. Bell*, 5 Ill. App. 352; *L. N. A. & C. R'y Co. v. Shires*, 108 Ill. 632; *Smith v. C. & W. I. R'y Co.*, 105 Ill. 521.

The seventh instruction given for appellee was misleading, ambiguous and improper under the issues, and is not authorized by the evidence adduced.

Instruction summing up the facts which the testimony tends to prove on one side and omitting all on the other is erroneous. *Pa. Co. v. Stoelke*, 104 Ill. 201; *Armfield v. Humphrey*, 12 Ill. App. 90; *Cushman v. Cogswell*, 86 Ill. 62; *Ogden v. Kirby*, 79 Ill. 555.

When there is evidence tending to prove a fact having an important bearing upon the law of a case, even though strongly contradicted, an instruction is erroneous which ignores the existence of such fact. *C. I. F. Co. v. Bradley*, 10 Ill. App. 328; *Chi. Pkg. & Prov. Co. v. Tilton*, 87 Ill. 547-553.

Where an instruction undertakes to canvass the salient features of appellee's evidence and calls attention particularly to it, to the exclusion and detriment of the evidence of appellant, such instruction is erroneous. *Anderson v. Warner*, 5 Ill. App. 416; *Wright v. Bell*, 5 Ill. App. 352; *Frame v. Badger*, 79 Ill. 441; *Martin v. Johnson*, 89 Ill. 537.

Messrs. E. F. BULL and G. S. ELDRIDGE, for appellee.

LACEY, J. The main cause assigned for error by appellant's counsel is the giving by the court the seventh, tenth and twelfth instructions for appellee; the allowing the appellee to prove against appellant's objection that the former had paid out the full sum of the contract price, \$3,900, which he was to pay Lamb for furnishing materials and labor for build-

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ing the house, to Lamb and other parties on Lamb's account, and that the verdict was manifestly against the weight of the evidence. We will notice the seventh instruction given for appellee first because first in order.

The substance of this instruction is that the order accepted by the appellant for \$1,503.67 from Lamb, for the bill of lumber sued on, drawn on the appellee, dated September 8, 1882, and presented to appellee by appellant for payment, was by virtue of such acceptance and presentation, *prima facie* evidence and established the fact *prima facie* that D. A. Lamb and not the appellee was originally liable to the plaintiff for such lumber. By this instruction the question mainly in issue, whether or not the appellee purchased the lumber of appellant as charged, was established to exist *prima facie* in the former's favor from and after the date of the acceptance and presentation in September, 1882. There was no dispute as to the acceptance and presentation of the order at that time or that the lumber was furnished on Lamb's order. This instruction virtually shuts out from the consideration of the jury, all plaintiff's evidence touching facts existing prior to the establishing of such *prima facie* case, and the defense must be regarded by the jury as completely successful unless the appellant could adduce evidence of facts subsequently occurring that would have the effect to overcome such *prima facie* case; and as there was no such evidence, it was the duty of the jury under the instruction to find for the appellee.

The effect of the instruction was, in view of the evidence presented, to command the jury to find for the appellee. The instruction did not present the law of the case and gave the mere fact that the appellant had accepted and presented the order, an exaggerated importance. The value of the fact of the acceptance and presentation of the order was nothing more than rebuttal evidence in appellee's favor, tending to show that the appellant in fact gave Lamb the credit and not appellee, and tending to establish the contention of the latter. The weight that should be given to it ought to rest with the jury. It was a fact to be considered in connection with all the other evidence in the case.

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According to appellant's theory the order was taken as a means only of collecting the debt due from appellee to him, but because the payment of the claim by appellee to him would extinguish so much of the debt of appellee to Lamb under his contract, it was essential to have Lamb satisfied and the matter settled with his consent, which his giving the order would effectuate. The giving the order may have been consistent with appellant's contention that the credit was given to appellee for the lumber.

The appellee, of course, contends that it was proof that the appellant had acknowledged that he had no claim against him, otherwise he would not have taken an order. There may be other considerations for and against on both sides, which the jury had a right to consider. It was for the jury to settle the matter as to what weight should be given to this particular part of the evidence, instead of being compelled by the instruction to give it the effect of excluding all other evidence in the case up to that time. The position that every plaintiff and every defendant occupies in every case is that before the introduction of evidence there is a *prima facie* presumption in defendant's favor and the plaintiff must overcome that by evidence. This was the only *prima facie* case that could have existed in favor of appellee and it would remain until the evidence was all introduced, when it was for the jury to say whether it had been overcome by a preponderance.

The 12th instruction given by the court for appellee is particularly complained of by appellant. It is thought that the instruction unjustly discriminates against that portion of the appellant's evidence that rests in the proof of the admissions of appellee in reference to the main fact in issue. The instruction is as follows: "The jury are instructed that they should examine with care all the evidence in this case; that especially is this so in relation to all such parts of the evidence as exist in oral statements of defendant testified to by other witnesses in the case. The jury should consider whether such evidence may or may not be subject to much imperfection and mistake; whether the speaker may have been misunderstood by the witness; whether the speaker

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may not have correctly expressed his own meaning; whether the witness may have forgotten a part of the language used or may use some expression which may change the meaning of the speaker, or the witness may have added a word or expression not used by the speaker or may have a word or expression used by the speaker which changes the meaning of the speaker."

We think it was erroneous to give this instruction. Aside from the requirement of the instruction to give the *appellant's* evidence in regard to oral statements of *appellee especially* close scrutiny, the instruction tended strongly to weaken the force of the appellant's evidence and to lead the jury to think that the court was of the opinion that the class of evidence introduced was of the very weakest nature. Nearly every imaginable suggestion was offered to the jury in regard to the manner in which they should *especially* be watchful to prevent deception. There was nothing in the nature of the evidence as given to suggest that it was liable to deceive in the matters suggested by the instruction and to which such pointed attention was called.

It seems that the instruction was suggested to counsel by an examination of the comments of law text writers upon the nature of admissions in which much of the language of the text is employed. Starkie on Evidence; Sharswood's notes, marginal pages, 325-7; Greenleaf on Evidence, Vol. 1, Sec. 200. This would not justify an instruction of this kind under the practice in this State where the jury are the sole judges of the weight to be given to the evidence.

In these same texts the commentators say that this class of evidence is "the weakest and most unsatisfactory," yet it has often been held that to give an instruction based on such a rule as announced by the text books, is error. Mauro v. Platt, 62 Ill. 450; Wright v. Bell, 5 Ill. App. 352; Rockwood v. Poundstone, 38 Ill. 199; Frizelle v. Cole, 42 Ill. 362, and other cases. This class of evidence may be the weakest of all evidence yet it may be the strongest especially when the admissions are clearly established. It may be the most convincing. The jury was not even told in the instruction that such

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was the law. We hold the court erred in giving the instruction complained of.

The jury were told in the tenth instruction that the minds of the parties must meet in order to make a binding contract, and that the terms and conditions thereof must be understood and assented to by each party. While this is true as a general rule, there was nothing in this case to call for such an instruction. If there was any such agreement as the appellant testified to, their minds met beyond question, and there was nothing in the nature of the alleged contract to suggest that they did not readily understand the meaning of it. The appellee denies the entire story as told by appellant in every part in regard to his agreement to pay for the lumber and have it furnished to him. The instruction was not applicable to any evidence in the case and should not have been given. We would not be willing to reverse the judgment for such error alone, but nevertheless the instruction ought not to have been given.

In regard to the point raised that the court erred in the admission of the evidence going to show that appellee had paid out to other parties the full contract price for the building, the appellee, while not claiming that it would have been proper, as we do not think it would, asserts that it was admitted without objection; and to the greater part we see no objection noted and suppose there was none. As the judgment is to be reversed it will be unnecessary to comment on the matter further, supposing that such alleged error, if made, will be corrected on a new trial.

As to the weight of the evidence, we will refrain from discussing that for the reason that the case may be again tried.

For the errors above noted the judgment is reversed and the cause remanded.

Judgment reversed and cause remanded.

INDEX.

ACKNOWLEDGMENTS.

1. In the absence of proof of fraud and collusion on the part of the officer taking and certifying the acknowledgment of a deed, his certificate in proper form must prevail over the unsupported testimony of the grantor that the same is false and forged. *Foster v. Latham*, 165

2. The use of the word "notarial" before the word "seal," in a certificate of acknowledgment of a Justice of the Peace, is surplusage, and does not invalidate the certificate. *Id.*, 165

ACTIONS—See HIGHWAYS, 1, 4, 6, 7, 11, 15; INSTRUCTIONS, 4, 9; JURISDICTION, 1, 3; TRESPASS, 1.

1. Under Sec. 123, Ch. 3, R. S., a right of action to recover damages for an injury to the person survives. This survivorship applies in case of the death of the defendant as well as that of the death of the plaintiff. *Wehr v. Brooks*, 115

2. Possession for sixteen years, and the payment of taxes under a claim of ownership, is sufficient evidence of title to sustain an action for use and occupation. *Ross v. Day*, 139

3. Where it does not appear that a party is an intruder or trespasser on land, that he holds it against the will of the owner, or that he is to enjoy the land without rent, the law will infer an implied agreement to pay rent. *Id.*, 139

4. In an action against Highway Commissioners to recover damages resulting from acts done in their official capacity, the plaintiff can not recover against one of the defendants for an act done in his personal capacity, and not directed or assented to by the Board. *Illinois Agricultural Co. v. Cranston*, 174

5. In an action to recover damages resulting from injuries to a colt, while lawfully in the pasture of a third person, caused by the defendant's dog, which he had unlawfully taken within the pasture, it is held: That the defendant is liable for any injury done by the dog; that no averment that he had previous notice of a vicious disposition in the dog was necessary, and that the declaration, being in an action on the case, was substantially good. *Green v. Doyle*, 205

6. The Dram Shop Act being highly penal in its provisions must be strictly construed in keeping with the object of its enactment. *Aden v. Cruse*, 391

7. Sec. 9 of said act, giving a right of action to one injured in his

ACTIONS. *Continued.*

means of support in consequence of the intoxication, habitual or otherwise, of any person, only applies, when fairly construed as part of the act, against those who are directly or indirectly engaged in the liquor traffic. *Id.*, 391

8. Said section does not give a right of action against a person not engaged in such traffic, who, as an act of courtesy or politeness, treats another to a glass of intoxicating liquor without any purpose of gain or profit. *Id.*, 391

ADMINISTRATION—See APPEAL AND ERROR, 11; FRAUD, 4; WIDOW'S AWARD.

1. Upon a bill filed by two creditors of David Wright, deceased—one by simple contract and the other by a Justice's judgment on which no execution issued during the life of the decedent—neither of whom has proved his claim in the County Court against the estate, to reach the proceeds of the sale under an alleged fraudulent *cha tel* mortgage of most of decedent's estate, the defendants being the mortgagee and the administrator, it is *held*: That the bill is in effect a creditor's bill, and that the decree can not be sustained, as it ignores the County Court and the rights of other creditors and of the family of the deceased. *Hall v. Black*, 294

2. The fact that a person residing with another has rendered gratuitous services raises no presumption that subsequent services of different character and rendered under different conditions are also gratuitous. *Hayden v. Henderson*, 299

3. Where evidence tends to show that a claimant against an estate lived with the deceased as a member of her family, the burden is upon the claimant to show otherwise. *Id.*, 299

4. In the case presented, the sole question being whether the claimant was a member of the family of the deceased, it is *held*: That said question was for the jury, and that certain evidence touching the circumstances of the claimant, the intention of the deceased to make some provision for her and the value of her services and provisions furnished, is not objectionable. *Id.*, 299

5. Where persons reside together as members of one family, and one of them renders services to the head of the family, the law does not imply a promise to pay therefor, nor a promise on the part of the one rendering such service to pay for maintenance, the presumption being that both services and maintenance are gratuitous. *Ginders v. Ginders*, 522

6. Where services are rendered with the family, under the rule of this State there can be no recovery against the head of such family unless it appears that there was an express promise to pay, or that the services were rendered under the expectation of both parties that payment was to be made, the burden of proof being upon the one who seeks to recover for such services. *Id.*, 522

7. Both an express and an implied contract can not exist at one and the same time concerning one and the same subject-matter. *Id.*, 522

ADMINISTRATION. *Continued.*

8. In the case presented, in which the daughter-in-law of the deceased seeks to recover from his estate compensation for services rendered as a member of his family it is *held*: That certain instructions were erroneous for improperly stating the rule as to the burden of proof and ignoring the circumstances surrounding the claimant, the intestate and her infant children; that statements made by the intestate relative to leaving the claimant a home were properly admitted; and that, if the services were rendered under an agreement that the intestate would by will or otherwise provide the claimant a home and support upon his death, and he failed to do so, she may recover upon a *quantum meruit* for the five years not barred by the Statute of Limitations. *Id.*, 522

9. The appraisers, in making their estimate of the widow's award under Secs. 74 and 75, Chap. 3, R. S., are not required to estimate the value of the family pictures and wearing apparel, the jewels of the widow and her minor children and the stoves and pipe used in the family, with the necessary cooking utensils, all of which are to be included in the award without regard to their value. *Boyer v. Boyer*, 534

10. The County Court may set aside an appraisement bill, or a report of appraisers making out and certifying an estimate of the value of the items allowed by statute as the widow's award, and order a new appraisement, or remove the appraisers and appoint others to make such new appraisement. *Id.*, 534

11. While the statute with respect to widow's awards should be literally construed, its construction should be reasonable and the allowances made under it should be within the bounds of reason. *Id.*, 534

12. In the case presented, it is *held*: That the County Court properly ordered the appraisement and award set aside; that the action of the Circuit Court in refusing a motion to allow the widow to amend the estimate because of the insertion therein of improper items, even if not within its discretion, was justified by the extraordinary allowances made by the appraisers; and that said court committed no error in ordering the affirmance of the order of the County Court. *Id.*, 534

AGENCY—See SALES, 9; STATUTE OF LIMITATIONS, 3.

1. Upon a bill to foreclose a trust deed of lands, forty acres of which are claimed by a subsequent purchaser who claims to have paid a certain part of the purchase money due the maker of the trust deed to the agent of the holder of the notes secured thereby upon an agreement with said agent to procure the release of said forty acres, it is held, upon a review of the evidence, that the agency claimed is not established thereby. *Garrels v. Meyer*, 381

APPEAL AND ERROR—See BILLS OF EXCEPTION, 7; INSTRUCTIONS, 2; NEGOTIABLE INSTRUMENTS, 5, 9; PRACTICE, 1, 2, 12, 13, 18; RAILROADS, 4, 5; REPLEVIN, 2.

1. When the evidence is conflicting this court will not interfere with the verdict of the jury. *Village of Mansfield v. Moore*, 32

APPEAL AND ERROR. *Continued.*

2. Errors which only affect one who did not join in the writ of error. can not be assigned on his behalf. *Brown v. Miner*, 60
3. A variance not specifically pointed out on the trial can not avail on appeal. *Bradley v. People*, 78
4. Where the only ground relied upon for the reversal of a judgment is that the verdict is contrary to the evidence, and the evidence is so contradictory that, in the opinion of this court, it was for the jury to decide which side was worthy of belief, their finding will not be disturbed. *Scott v. Sharp*, 108
5. Where a jury is waived and the cause is tried by the court, the same presumptions attach to the findings of the court as would have attached to the verdict of a jury. *Claybaugh v. Hennessey*, 124
6. Upon a review of the evidence, which was conflicting, the judgment of the court below is affirmed, the question being as to whether a certain agreement was in effect the surrender of a note. *Id.*, 124
7. This court may ignore an objection not raised below, and not specifically stated in the assignment of errors. *Vanliew v. Second N'l Bank*, 126
8. An objection not raised in the court below may be ignored by this court. *Haldeman v. Mass. Mut. Life Ins. Co.*, 146
9. Where the evidence was conflicting and the case was properly presented to the jury, this court will not disturb the verdict. *Illinois Agricultural Co. v. Cranston*, 174
10. This court will not interfere with the judgment of the court below, unless it clearly appears that substantial error has been committed to the injury of the appellant. *Id.*, 174
11. In a case where the question at issue is mainly one of fact, this court affirms the judgment of the court below, allowing the claim of a surety against an estate, upon a review of the record, without stating the case and its reasons at length. *Powell v. Wharton*, 176
12. Where the evidence in support of the verdict is sufficient, if believed, this court will not interfere. *Indianapolis, B. & W. Ry. Co. v. Buckless*, 181
13. This court has no basis on which to make an order for an allowance of attorney fees to the appellee for services here. nor is there any convenient mode for its determination of such allowance, if the appellee is entitled thereto. *Id.*, 181
14. The finding of a Justice of the Peace, in a proceeding under Sec. 30 Ch. 8, R. S., for proof of damages for sheep killed or injured, is in no sense a judgment, and no appeal lies therefrom. *Lamont v. Town of Montebello*, 186
15. A bond given by a Supervisor upon an attempted appeal from such a finding is absolutely void, and it will not sustain an action. *Id.*, 186
16. The obligors in such a bond are not estopped from denying the recitals therein contained. *Id.*, 186
17. This court reverses the judgment of the court below *pro forma*, the appellee having failed to file his brief. *Green v. Smith*, 198

APPEAL AND ERROR. *Continued.*

18. This court will not consider an objection that the damages are excessive, which was not made on the motion for a new trial. *City of Springfield v. Scheevers*, 203

19. A judgment will not be reversed on account of errors which worked no substantial injury to the appellants. *Green v. Doyle*, 205

20. Where the evidence is conflicting, and there is enough to warrant the verdict, this court will not interfere. *Fletcher v. Patton*, 228

21. Where the evidence is conflicting and there is enough to warrant the verdict, this court will not interfere. *Haldeman v. Sennett*, 230

22. This court will not reverse a judgment for errors which could not have injured the appellant. *Id*, 230

23. A judgment will not be reversed for a slight error in an instruction which could have worked no injury to the appellant. *Indiana, B. & W. Ry. Co. v. Nicewander*, 305

24. In a proceeding to recover a penalty for the sale of intoxicating liquor in violation of an ordinance, this court declines to decide the effect of a repeal of the ordinance in question, as no brief has been filed by appellee, but reverses the judgment of the court below because it awards execution against the city. *Hoopston v. Morris*, 307

25. Where there is sufficient evidence, if believed, to support the verdict, this court will not interfere. *City of Springfield v. Seiglar*, 334

26. Where the record presents only questions of fact arising upon a conflict of evidence, this court will not interfere. *Indiana, B. & W. Ry. Co. v. Hinshaw*, 335

27. In an action on a certificate of membership in a mutual benefit association, entitling the children of the holder to participate in its relief fund to a certain amount, or such part thereof as might be collected, as specified in the constitution and by-laws of the association, it is held by this court, in reviewing a judgment by default for the full amount of the certificate, that in the absence of a bill of exceptions it is to be presumed that the finding of the court below was supported by the evidence heard by that court. *Northwestern B. & M. A. Ass'n v. Woods*, 372

28. This court will not, upon a writ of error, reverse a judgment for an error which worked no injury to the plaintiff in error. *Northwestern B. & M. A. Ass'n v. Mann*, 377

29. A decree in chancery dismissing a bill will be reversed if, by the proofs appearing in the record, it is not justified, although it is not certified that the transcript contains all of the evidence. *Turner v. Turner*, 430

30. Where the evidence is conflicting and there is enough to support the finding, this court will not interfere with the verdict, on the ground that it is against the evidence. In such a case the court will not attempt nicely to weigh the evidence on each side, and will grant a new trial only when the verdict is manifestly against the evidence. *Dole v. Clow*, 477

APPEAL AND ERROR. *Continued.*

31. Where a jury is waived, the finding of the court, like the verdict of the jury, is conclusive, unless it is manifestly against the weight of evidence. *McMahill v. Humes*, 514

32. Where the question involved depends on the credibility of the witnesses, this court will not interfere with the finding of the jury. *Classen v. Cuddigan*, 591

33. Where the question involved is one of fact, this court will not interfere with the verdict of the jury, unless it is clearly against the weight of evidence. *Radeke v. Cook*, 595

34. An assignment of error based on newly discovered evidence, does not lie, when it was not specified in the motion for a new trial. *Id.*, 595

35. An objection, raised here for the first time, to the filing of counter affidavits on a motion for a new trial, can not be considered by this court. *Id.*, 595

36. When a jury is waived and the cause is tried by the court, the finding is entitled to a like consideration as the verdict of a jury found under like circumstances. *Davidson v. Sprague*, 611

37. Where the evidence is conflicting the jury have the exclusive right to pass upon and determine its weight and to find the facts. *Lowe v. Ravens*, 630

38. This court will not interfere with the verdict of the jury when it is not clearly against the weight of the evidence and it does not appear to have been prompted by passion, prejudice, or misapprehension of the evidence. *Id.*, 630

39. An instruction which calls special attention to an isolated fact in the evidence, thereby giving it undue prominence, is improper, but such error is not a sufficient cause for reversal where the defeated party was not thereby injured. *Lewis v. Barber*, 638

ATTACHMENT.

1. Under Sec. 37 of the Attachment Act other creditors bringing ordinary actions against the same debtor and succeeding in the recovery of judgments at the same term as the attachment creditor, are entitled to share *pro rata* in the proceeds of the attached property. But if the attachment for any reason fails to hold the property, it will not avail either the attaching creditor or others who rely on the provisions of said section. *Kennedy v. Wikoff*, 277

2. Sec. 37 of said act does not apply to garnishee proceedings under Chap. 62 R. S., and a creditor who recovers upon garnishee process under said chapter is not required to share the proceeds with other creditors. *Id.*, 277

3. The substance only of the statements constituting the fraud is required to be reduced to writing, to comply with the proviso contained in the 9th clause of Sec. 1, of the Attachment Act. *Dodge v. Yates*, 547

4. In the case presented, it is held that a receipt given to the "former guardian" of certain wards, and signed by the defendants as "suc-

ATTACHMENT. Continued.

ceeding guardian," is sufficient within said proviso to charge the defendant who falsely represented that he had duly qualified as such guardian. *Id.*, 547

ATTORNEY'S FEES—See **APPEAL AND ERROR**, 13; **RAILROADS**, 3; **USURY**, 2, 4, 5.

BILLS, NOTES AND CHECKS—See **NEGOTIABLE INSTRUMENTS**.

BILLS OF EXCEPTIONS—See **PRACTICE**, 16, 17.

1. Where there is no bill of exceptions nor certificate of evidence, the presumption is that the findings of the decree were warranted by the proof. *Brown v. Miner*, 60

BONDS—See **APPEAL AND ERROR**, 15, 16.

BRIDGES.

1. Upon a petition for a writ of *mandamus* to require a county to contribute half of the cost of a town bridge under the emergency clause of Section 19, Act of June 23, 1883, it is *held*: That an emergency which arose before and continued until after it went into effect is within the act; that this construction does not give the act a retroactive operation, and that the town is not required to show that it has provided half the funds necessary to build the bridge, it being the duty of the County Board, when such fact is not shown, to make its appropriation conditional. *People v. Board of Supervisors*, 271

BROKERS—See **GAMBLING**, 1; **USURY**, 1.

1. Where the owner consigns goods to a factor to sell and account to him for them, and the factor exhibits himself to the world as the owner, without the knowledge or consent of the owner, the creditors of the factor can not seize the goods for his debt, even in the absence of actual notice. *Ellsner v. Radcliff*, 195

2. Where it is a matter of dispute whether the transaction in question was a sale or a consignment the party claiming to be the owner has a right to have his claim passed upon by the jury under proper instructions. *Id.*, 195

BURDEN OF PROOF—See **ADMINISTRATION**, 8.

CARRIERS—See **RAILROADS**.

CHANCERY.

1. In chancery the question whether an issue as to the sanity of a party should be referred to a jury is, except in certain special cases, entirely within the discretion of the court. *Brown v. Miner*, 60

CHATTEL MORTGAGES—See **ADMINISTRATION** 1; **REPLEVIN**, 2.

1. A sale by the owner of personal property covered by a chattel mortgage, without notice to the vendee, is void. *Potts v. McPherson*, 121

2. A mortgagor of personal property can not recover from the purchaser at mortgagee's sale the difference between the price paid

CHATTEL MORTGAGES. *Continued.*

and the price agreed upon between the parties on an attempted private sale prior to such sale, and before said purchaser knew of said mortgage. *Id.*, 121

3. A chattel mortgage is valid though at the time of its execution a third person holds the property under the mortgagor, and has or claims to have a special property therein. *Hughes v. Stubblefield*, 216

4. In the case presented, it is held that a chattel mortgage of property, which was at the time of its execution in the possession of a third person under a distress warrant, is valid. *Id.*, 216

5. After verbal sale and delivery of chattel property or after *bona fide* delivery of mortgaged chattels to the mortgagee in satisfaction of the debt, the vendee or mortgagee may temporarily loan the same to the vendor or mortgagor or employ the latter to use the chattels in the service of the vendee without invalidating his title. *McMahill v. Humes*, 513

6. Where the mortgagor merely hitches horses to the mortgagee's rack for a half hour and then borrows them, the possession of the mortgagee is not long enough to apprise all parties of the change of ownership. *Id.*, 513

7. After a valid sale and delivery of chattel property, or after a *bona fide* delivery of mortgaged chattels to the mortgagee in satisfaction of the debt and possession taken by the mortgagee, the vendee or mortgagee may temporarily loan such chattels to the vendor or mortgagor, or employ the latter to use them in his service without invalidating his title. But in order to make such transfer of property valid as against third parties there must be a substantial change of possession of such character or duration as would reasonably notify other persons that the property was transferred and the ownership changed. *Eagle v. Rohrheimer*, 518

8. In an action of replevin to recover certain personalty as the property of the mortgagor thereof, it is *held*: That, under the evidence, there was no apparent change of possession of a horse, for which the mortgagor had given a bill of sale to the mortgagee; and that evidence of statements made by the former as to the date of the bill of sale was properly excluded, as the vendor can not be heard after sale to impeach the title of the vendee. *Id.*, 518

CONTRACTS—See ADMINISTRATION, 5, 8; FORMER ADJUDICATION, 1; HIGHWAYS, 1; INSTRUCTIONS, 4; PARTY WALLS, 2; SALES, 9; STATUTE OF FRAUDS, 1, 3.

1. It is a rule of construction that a contract should be supported rather than defeated. *Easton v. Mitchell*, 189

2. In an action to recover for work done under a special contract for constructing a tile ditch, it is *held*: That the evidence tends to show a failure of performance of the contract; and that the court below erred in refusing an instruction as to the time of commencing the suit, the evidence tending to show that it was prematurely brought. *Bowers v. Davis*, 297

CORPORATIONS—See EVIDENCE, 4.

COSTS—See LANDLORD AND TENANT, 9; EJECTMENT, 1.

1. The fact that witnesses who had been subpoenaed were not called to testify, is not of itself sufficient reason why their fees should not be taxed. *Highway Commissioners v. Hamilton*, 199

2. In the case presented, it is held that a motion to retax costs previously paid by the adverse party should have been denied. *Id.*, 199

COURTS—See ADMINISTRATION, 10, 11.

COVENANTS.

1. A covenant not to sue within a limited time can not be pleaded in bar to an action brought before the time has expired, although contained in a composition agreement in which the rights of third parties are involved. *Pitts' Sons' M'f'g Co. v. Commercial Nat. Bank*, 483

2. In the case presented it is held that the plea is clearly in bar and can not be treated as a plea in abatement. *Id.*, 483

CREDITOR'S BILLS—See ADMINISTRATION, 1.

CRIMINAL LAW—See PLEADING, 1.

1. An indictment charging the defendant, as judge of an election, with having altered and defaced ballots legally voted at such election, need not contain the names of the electors whose ballots are alleged to have been altered. *Binger v. People*, 367

2. The mere fact that a name on a ticket is scratched raises no presumption against a judge of the election that he made the erasure. *Id.*, 367

3. It is no objection to such an indictment that the defendant is charged therein as a judge of election at an election for township officers. The general laws of the State apply to elections for town officers at elections held under the Township Organization Act. *Id.*, 367

4. In the case presented, it is held that the evidence does not show the defendant to have been a "legally qualified judge of election," another person having been chosen moderator of the town meeting. *Id.*, 367

DAMAGES—See LANDLORD AND TENANT, 8; MUNICIPAL CORPORATIONS, 9, 11; RAILROADS, 16.

1. In an action by a servant girl, to recover damages for an injury to her personal effects, resulting from the placing of them in the street by the defendant, whose services she had left under circumstances of great provocation, it is held that a verdict for thirteen times their value is excessive. *Herkimer v. Shea*, 85

DITCHES—See HIGHWAYS, 1, 5, 12-14; REAL PROPERTY, 5-8; TRESPASS, 1.

DOGS—See ACTIONS, 5.

DRAM SHOPS—See ACTIONS, 6-8; SALES, 4.

EASEMENTS—See HIGHWAYS, 1.

EJECTMENT.

1. Upon petition for the vacation of the judgment and for a new trial in an action of ejectment, it is held that a failure to pay the costs for more than a year after the close of the term at which the judgment was rendered is not sufficiently excused by an allegation that the clerk had not computed the amount thereof because of the absence of the files in the hands of some unknown person, it not appearing that the petitioner had used due diligence. *Aholtz v. Durfee*, 144

ELECTIONS—See CRIMINAL LAW, 1-4.

EQUITY—See EVIDENCE, 6; FRAUDULENT CONVEYANCES, 1.

1. As a general rule a court of equity will not take jurisdiction to enjoin judgments at law where there is an adequate remedy at law. It will not review a judgment at law as a court of errors. *Ala. Ins. Co. v. Kingman*, 493

2. The practice of resorting to courts of equity to enjoin judgments at law should not be encouraged. *Id.*, 493

3. Upon a bill to enjoin a judgment by default on a policy of insurance, on the grounds that service on a "late agent" of the complainant company was insufficient and that said policy had been fraudulently altered, it is *held*: That the remedy at law by writ of error is complete, and that if the judgment was obtained without jurisdiction, it is void even in a collateral proceeding. *Id.*, 493

ERROR—See APPEAL AND ERROR.

ESTOPPEL—See APPEAL AND ERROR, 16; EXEMPTIONS, 2; INSURANCE, 6; REPLEVIN, 5.

EVIDENCE—See ACKNOWLEDGMENT, 1; ADMINISTRATION, 8; APPEAL AND ERROR; EXECUTIONS, 2; FORMER ADJUDICATION, 3; GAMBLING, 1; GUARDIAN AND WARD, 1-3; HIGHWAYS, 11, 13-16; HUSBAND AND WIFE, 2, 3; INSTRUCTIONS, 2, 9; JUDGMENTS, 3; JURISDICTION, 12; LANDLORD AND TENANT, 1, 8, 11; MASTER AND SERVANT, 3; MUNICIPAL CORPORATIONS, 11; NEGLIGENCE, 3; NEGOTIABLE INSTRUMENTS, 1, 9, 12; PHYSICIANS, 1; PRACTICE, 15, 19; RAILROADS, 5, 7, 12, 16; REPLEVIN, 1; SALES, 5, 8, 13; STATUTE OF FRAUDS, 1, 2.

1. Copies of the notes sued on are held to be competent evidence, the parties having agreed to their use and the defendant having wrongfully aided in placing the notes in the records of the other court. *Mount v. Scholes*, 192

2. In the absence of other suspicious circumstances, it is not a sufficient ground for the exclusion of a public record, when offered in evidence, that some of its leaves are missing. *People v. Board of Supervisors*, 271

3. Where an officer's return, appearing in the record of a former adjudication, shows an actual personal service, it can not be contradicted in a collateral proceeding at law by evidence dehors the record. *Harrison v. Hart*, 349

4. In an action to recover damages for removing a certain structure

EVIDENCE. *Continued.*

from a race-way which crosses plaintiff's lot, it is *held*: That the evidence is ample to show that the Elgin Hydraulic Company was the owner of the race-way and had the right to remove obstructions therefrom; that the act incorporating said company being a public act, the courts are bound to take judicial notice of its incorporation; that the plaintiff admitted the incorporation of said company by making it a party defendant; that the evidence shows that the directors of the company, a portion of the defendants, acted in pursuance of the request and order of the company; that no former resolution of the board of directors was necessary to authorize such work; and that the evidence that the structure removed was an obstruction sufficiently supports the finding of the court below. *Nimmo v. Jackman*, 607

5. Possession itself, as to either personal or real property as against one who can show no title, is evidence of ownership. *Id.*, 607

6. Upon appeal from a decree in equity, declaring a lien in the nature of an equitable mortgage on a lot in favor of certain executors, it is *held*: That the evidence though conflicting supports the decree, the evidence of one of the appellants being untrustworthy because contradicted by statements made by him under oath in certain collateral proceedings. *Stewart v. Fellows*, 618

EXECUTIONS—See APPEAL AND ERROR, 24; FRAUD, 3; JUDGMENTS, 4; PRACTICE, 14.

1. An execution issued before the entry of the judgment is void, and a subsequent entry will not validate it. *Humphreys v. Swain*, 232

2. Parol evidence is admissible to show that the execution was issued and in the hands of an officer before the entry of the judgment. *Id.*, 232

3. It is error to award general execution upon a judgment against a Board of School Directors. Such judgment can only be enforced as provided in ¶ 50, Chap. 122, Starr & C. Ill. Stat. *Board of Education v. Hoag*, 588

EXEMPTIONS.

1. When the wife has, in fact, become the head of the family by taking exclusive charge and control of its earnings and the financial and business interests necessary to support and keep it together, although her husband resides with her, she is entitled to the benefit of the exemption laws as the head of the family. *Temple v. Freed*, 238

2. The positive refusal by the owner of personal property to make a schedule at the time of the levy under execution, upon due notice and opportunity given, does not of itself prevent or estop him from making such schedule within a reasonable time thereafter. *Johnston v. Willey*, 354

3. What is a reasonable time for making and delivering the schedule depends upon the special circumstances of each case, and is a question for the jury. In some cases it should be before levy. In others it will be in time if before sale. *Id.*, 354

3. In the case presented no question of fraud arises. The owner's refusal was in ignorance of his duty and without intention to waive his

EXEMPTIONS. *Continued.*

claim. He made and delivered the schedule within a few hours, and as soon as he could get legal advice. Whether the time was reasonable was a question for the jury. *Id.* 354

FALSE IMPRISONMENT—See **JURISDICTION**, 12.

FENCES—See **RAILROADS**, 1, 2.

FORMER ADJUDICATION—See **NEGOTIABLE INSTRUMENTS**, 10.

1. The facts and law of a cause, as determined by this court and by the Supreme Court, in another suit between the same parties, can not be changed, after the cause has been remanded to the court below, by the agreement of a party, the default of others, new or additional evidence however taken, or any decree of the court without the consent of the parties. *Fanning v. Russell*, 220

2. A fact which has been directly tried and decided by a court of competent jurisdiction can not be contested again between the same parties in the same or any other court. *Miers v. Pinover*, 551

3. In an action upon the third of three promissory notes, given at the same time for the same consideration and as part of the same transaction, it is *held*: That the record of a former suit on the other notes is admissible and conclusive of the question of the partnership of the makers, that question having been directly in issue in said suit; that the fact of the existence of the partnership being thus established, certain admissions by one of the partners that the transaction in question was a partnership matter, were properly admitted in evidence, and that there was no error in the instructions. *Id.*, 551

FRAUD—See **ATTACHMENT**, 3, 4; **CHattel MORTGAGES**, 5-8; **EXEMPTIONS**, 4; **FRAUDULENT CONVEYANCES**; **GUARDIAN AND WARD**, 3; **JURISDICTION**, 8; **REPLEVIN**, 5; **SALES**, 1, 2, 7-12.

1. In an action to recover a balance claimed to be due on a policy of life insurance, the surrender of which is alleged to have been fraudulently procured by the agent of the defendant, it is *held*, upon a review of the evidence, that the charge of fraud is not sustained and is not true in fact. *Mass. Mut. Ins. Co. v. Hayes*, 258

2. Where the parties to a settlement sustain to each other no relation of trust or confidence, the settlement can not be impeached as fraudulent because of false affirmation by one of them of mere matter of opinion, or even of fact, which is at least equally open to the knowledge or inquiry of the other. *Id.*, 258

3. In an action against a sheriff and deputy sheriff for taking certain horses, it is *held*: That the evidence justifies the conclusion that the supposed sale of the horses by the defendant in certain executions to his son, the appellant, was fraudulent and void as against creditors; that there had been no delivery of the horses to appellant; that it does not appear that the officer had notice of the assignment of the judgments to the appellant and of his ownership of the executions prior to the levy and sale, and that the instructions when considered together were substantially correct. *Bressler v. Beach*, 422

FRAUD. Continued.

4. Upon a bill filed to recover the amount of a claim allowed in the County Court against an estate, it is *held*: That the claim presented by the father of the deceased was for money advanced to his son as a gift; that it was barred by the Statute of Limitations, and that it was allowed through fraud and collusion between the claimant and the administrator. *Turner v. Turner*, 427

5. Upon a writ of error to review a decree dismissing a cross-bill, filed to determine the priority and extent of the liens claimed by the cross-complainant in certain lands, and to have the cancellation of a certain trust deed declared void and the trusts therein established, it is *held*: That the record does not present sufficient evidence to sustain the charge of fraud in procuring the release of said trust deed; and that the subsequent acceptance by the cross-complainant of a new note for the indebtedness covered by said trust deed, with full knowledge of said release, was a ratification thereof. *Seymour v. Mackey*, 449

6. Fraud is not to be presumed but must be proved by facts and circumstances in the case. The law presumes any business transaction to be honest until the contrary is shown. *Wood v. Clark*, 464

FRAUDULENT CONVEYANCES.

1. The widow of the grantor can not maintain a bill in equity to set aside a conveyance in which she joined as his wife, knowing it to be without consideration and for the purpose of defrauding creditors, unless she can excuse her participation in the act complained of. The excuse that she was too sick to care what she did, is insufficient when it appears that she knew the nature and effect of the deed. *Barnes v. Gill*, 129

GAMBLING.

1. In an action by a broker to recover advances made to cover losses on purchases and sales of corn ordered by the defendants, it is *held*: That the instructions as to the strictness with which said orders should be construed were erroneous as applied to the case presented; that under the evidence the transactions in question were not gambling transactions, and that certain evidence as to the "kind" of transactions between the parties was improperly admitted. *King v. Luckey*, 132

GARNISHMENT—See ATTACHMENT, 2.

GIFTS—See FRAUD, 4.

GUARDIAN AND WARD—See MORTGAGES, 2.

1. The order of a Probate Court, finding the amount due from a guardian, though generally conclusive against the guardian and sureties, may be impeached for fraud. *Seago v. People*, 283

2. Sec. 2, Ch. 51, R. S., and the first exception thereto, when construed together, do not exclude the evidence of the adverse party to a suit, brought by an "heir" to enforce a right not claimed by inheritance, as to facts occurring during the minority of the plaintiff. *Id.*, 283

GUARDIAN AND WARD. *Continued.*

3 In an action against a guardian and surety to recover a balance shown to be due by a report of the guardian, which had been duly approved by the Probate Court, it is *held*: That a former sworn report of the guardian, which shows a much less balance to be due, the ward being therein charged for board, is admissible in support of a plea charging fraud, and that the surety is a competent witness for all purposes, the suit not being brought by the plaintiff as an heir. *Id.*, 283

HIGHWAYS—See ACTIONS, 4; INJUNCTIONS, 2. •

1. A bill to enjoin the owner and occupant of premises adjoining a highway from filling up an artificial ditch thereon, and without the limits of the highway, does not lie, unless the public has by deed, prescription or condemnation acquired a right to the use of such ditch as an easement. And it is so held, although at the time of filing the bill the ditch had been in existence thirteen years, had been kept open by the Commissioners of Highways, and the occupant had been paid from public funds for improving it under a contract with the Commissioners. *Simpson v. Wright*, 67

2. To give the Commissioners of Highways jurisdiction, a petition under Sec. 54 of the Act of 1883, must substantially aver that the proposed road is to be laid out from one dwelling or plantation of an individual to a public road, from one public road to another, or from a lot of land to a public road. *Commissioners of Highways v. Mallory*, 184

3. When the clause "or from a lot of land to a public road" is relied upon, the petition must contain a suitable description of such lot. *Id.*, 184

4. Commissioners of Highways are individually liable for injuries resulting to others from the negligent performance of their official duties in constructing or repairing a public highway, such duties being ministerial. *Skinner v. Morgan*, 209

5. It is negligence on the part of Highway Commissioners to leave a tile ditch along a highway open for months, without proper measures to protect those using such highway. *Id.*, 209

6. A Justice of the Peace has jurisdiction of an action to recover damages for an injury to personal property caused by the negligent performance by Highway Commissioners of their duties. *Id.*, 209

7. In an action against Highway Commissioners to recover damages for injuries caused by a defective bridge, it is held that instructions, from which the jury no doubt inferred that the defendants were bound to know the danger and provide against it, are too broad. *Neinsteil v. Smith*, 235

8. It *seems* that Highway Commissioners are not to be regarded as knowing what they might have ascertained as to the dangerous condition of a bridge; that in the discharge of their official duties they are only required to exercise their judgment as reasonably prudent men, and that the duty in question was something more than ministerial in character. *Id.*, 235

9. Sec. 57, Ch. 121, R. S., attempting to provide for the opening of

HIGHWAYS. *Continued.*

roads, "on township or county lines, or from one township into another," is defective in that the words "or township" were inadvertently omitted after the word "county" in the provision requiring the petition to be "signed by not less than twelve land owners residing in either county within three miles of the road." In the construction of said section this court supplies the omitted words, and holds that "either" must be read to mean "each." *People v. Blackwelder*; 254

10. Upon demurrer to a petition for a writ of *mandamus* to compel the Commissioners of Highways of the towns of North and South Litchfield to allot to each of said towns a part of a road along a line dividing the towns, for its maintenance, and to apportion the expense of locating the same, it is *held*: That the road in question was not located according to law, the requisite number of land owners of each township not having signed the original petition. *Id.*, 254

11. In an action by a Commissioner of Highways to recover for services growing out of his official duties, it is *held*: That under Sec. 117 of the Act of 1879, a Commissioner of Highways is entitled to recover \$1.50 per day for each day necessarily employed in the discharge of his official duties; that such employment is not limited to attendance upon official meetings of the Board, and that a general offer to prove that the plaintiff rendered services upon the highways, covering an extraordinary number of days, was too general, and did not tend to prove any item for which he was entitled to recover. *Martin v. Town of La Salle*, 438

12. The right to lay a tile drain for private purposes along a highway, is one which the Commissioners of Highways have no power to grant. *Murray v. Gibson*, 488

13. The right to dig and maintain such a drain is such a right and interest in land as can not be given by parol but must be created by deed. *Id.*, 488

14. In the case presented, it is *held*: That the jury must be presumed to have found the issue of fact as to whether the plaintiff granted permission to dig the ditch in question, in favor of the defendants; that the jury must also have found that the condition as to obtaining the consent of the Commissioners was complied with; that such finding is not manifestly against the weight of the evidence; that the evidence sustains a finding that there was no revocation of the parol license prior to the commencement of this suit; that it is sufficient that the plaintiff gave his consent to the digging of the ditch, although he was ignorant of his legal right to forbid it; that such consent or parol license until revoked was a complete bar to all suits for trespass on account of digging and maintaining said ditch; that said license protected any who assisted in digging the ditch, and that the claims that the ditch was not properly constructed and that it should have been tiled at once were for the jury to determine. *Id.*, 488

15. In an action to enforce the statutory penalty for the obstruction of a highway, it is *held*: That the verdict for the plaintiff is supported by the evidence; that the order of the Commissioners, laying out the

HIGHWAYS. *Continued.*

road, was properly admitted, although the record showed no assessment and payment of damages, the act of 1851 not requiring a record of anything but the order; that Sec. 52, Chap. 121, R. S., is also applicable; that the evidence shows the road was duly established and opened, and that it established the existence of the road by user for a period of more than twenty years prior to the alleged obstruction. *Lowe v. Town of Aroma*, 598

16. Sec. 52, Chap. 121, R. S., making the Town Clerk's record *prima facie* evidence of the regularity of official action in relation to highways, applies where the road was established before as well as after its enactment. *Id.*, 598

HOMESTEAD—See MORTGAGES, 6.

HUSBAND AND WIFE—See EXEMPTIONS, 1.

1. Prior to April 24, 1861, when the Married Women's Act of 1861 took effect, the husband was seized of a life estate in the equitable and legal estate of his wife, and said act did not affect such life estate where it had previously vested. *Koehler v. Miller*, 557

2. A husband in possession and control of his wife's estate under his said common-law right, is presumed to act for himself and not as her agent in the erection of a wall thereon; and she is not liable for injuries resulting from his negligence in the erection of said wall. *Id.*, 557

3. In the case presented it is held that statements made by the husband in the absence of the wife were improperly admitted. *Id.*, 557

4. An instruction should not single out and call special attention to a circumstance in evidence which is inconclusive in character. *Id.*, 557

INJUNCTIONS—See EQUITY, 2, 3; HIGHWAYS, 1; REAL PROPERTY, 8.

1. An injunction will not be granted to prevent wrong in the abstract, a wrong that is only nominal or theoretical in character, or a wrong that is merely apprehended by the petitioner. *Newby v. Commissioners of Highways*, 245

2. Upon a bill filed to enjoin Highway Commissioners from opening a highway over the complainant's land, it is held that the sworn answer and personal testimony of the defendants, admitting the invalidity of an order establishing the road and disclaiming all right and intention to enforce it, overcame any presumption of intention to open the road that might arise from the mere existence of the order. *Id.*, 245

INSANITY—See CHANCERY, 1.

INSOLVENCY—See JURISDICTION, 7, 8.

INSTRUCTIONS—See ADMINISTRATION, 8; APPEAL AND ERROR, 23, 39; CONTRACTS, 2; GAMBLING, 1; HIGHWAYS, 7; HUSBAND AND WIFE, 4; INSURANCE, 6; JURISDICTION, 12; LANDLORD AND TENANT, 9, 11; MASTER AND SERVANT, 3; MUNICIPAL CORPORATIONS, 11; NEGLIGENCE, 3; NEGOTIABLE INSTRUMENTS, 12; PRACTICE, 1, 5, 18, 19; RAILROADS, 10, 11, 12; REAL PROPERTY, 4; SALES, 5, 9, 13.

INSTRUCTIONS. *Continued.*

1. Where the evidence is so complicated as to render the proper determination of the issue doubtful, great accuracy in the instructions is required. *Druly v. Estate of Johnson*, 267

2. In the case presented, in which the question involved is whether a claim against an estate, based on a note given by the deceased, is an individual or partnership debt, it is *held*: That the production of the note made a *prima facie* case of individual indebtedness; that an instruction to the effect that the plaintiff "must go further," and show by a preponderance of evidence that the money was loaned to the deceased individually, was misleading, and should have been refused; that an instruction given as to the interest of certain witnesses as heirs of the deceased, though correct as a proposition of law, was erroneous, as containing an argument which was in itself unsound; that an alleged error, which manifestly did the appellant no harm, is immaterial, and that an objection to the answer of the partner of the deceased to a question as to whether he signed the note as surety, was improperly sustained. *Id.*, 267

3. Instructions which contain all that is really applicable and important, although not every instruction is itself entirely accurate, are sufficient. *Hayden v. Henderson*, 299

4. In an action by a sister against her brother to recover wages claimed to be due her for services in his family, and also to recover on a note, it is held that, as the question of liability rested upon an alleged express contract, a certain instruction complained of contained no serious error. *Holmes v. Holmes*, 311

5. An omission in an instruction is not error if it is supplied elsewhere in the instruction given. *Village of Mansfield v. Moore*, 326

6. Where the testimony is conflicting, the instructions should be accurate and clear. It is not sufficient that a necessary qualification of an instruction given may be found in the instructions given for the opposite party. *Town of Geneva v. Peterson*, 454

7. Where the testimony is conflicting the instructions should be accurate and clear. *City of Aurora v. Parks*, 459

8. It is not error to refuse an instruction though it may contain a correct proposition, when its substance is contained in another instruction, given at the instance of the same party. *Wood v. Clark*, 464

9. In an action to recover the price of a boiler, engine and inspirator attachment, it is *held*: That it was error to admit in evidence the shipping bills of the carrier to show the condition of the machinery when shipped; that certain instructions were erroneous, there being no evidence upon which to base them; that an instruction assuming that the defendant kept men in his employ an unreasonable length of the time was erroneous, the fact assumed being for the jury; and that an instruction touching the leakage of the boiler was erroneous in view of the evidence. *Mitchell v. Willard*, 500

10. Where the court has properly instructed the jury on a given point, it is under no obligation to repeat the same principle of law in another instruction in different phrasology. *Smith v. Taggart*, 538

INSURANCE.—See APPEAL AND ERROR, 27; FRAUD, 1, 2.

1. In an action brought on a certificate or policy of life insurance, the assured having committed suicide, it is held that the application, containing a stipulation excepting death from suicide from the risk, must be construed with the certificate as one instrument. *Northwestern Beneficent and Mut. Aid Association v. Bloom*, 159

2. An allegation that the assured "did then and there immorally, wrongfully and wickedly" commit suicide, is substantially an allegation that he committed the act while sane. *Id.*, 159

3. Where the husband surrenders a policy of insurance on his life, payable to his wife, to the insurance company, in exchange for a policy in favor of his children, and upon his death payment of the latter policy is made to the guardian of the children, the widow can not maintain a bill against the guardian for the amount of the policy; as a court of equity is without jurisdiction, and there is no privity between the parties. *Wheeler v. Mortland*, 177

4. In an action upon a certificate of membership in a mutual aid association, it is held: That the statements made by the insured, in regard to his condition and habits, are representations, and not warranties; that it is sufficient if they were made in good faith, although some one or more of them may have been untrue, and that there was no error in the refusal of the court below to give certain instructions which treated such statements as warranties. *Northwestern B. & M. A. Ass'n v. Cain*, 471

5. In an action upon a policy of fire insurance it is held: That the verdict for the plaintiff is manifestly against the weight of evidence which shows the house to have been unoccupied at the time of the loss within the meaning of the clause exempting the defendant from liability while unoccupied. *Agricultural Ins. Co. v. Frith*, 593

6. In an action upon a policy of insurance, wherein the defendant claims that the policy is void because the buildings insured were not entirely situated upon the plaintiff's grounds, and because of a change in the firm insured, and that the action is barred by the six months' limitation in the policy contained, it is held: That these objections are met by an adjustment of the loss made by an independent adjuster whose acts were ratified by the defendant; that certain customary reservations if made in said settlement could not effect the waiver by the defendant of the six months' limitation clause of the policy; that defendant is estopped by the knowledge of its agent of the situation of the buildings and the change in the firm insured; and that certain objections to instructions can not avail the appellant. *German Fire Ins. Co. v. Carrow*, 631

7. The law does not favor clauses of limitations in policies of insurance. They are strictly construed and allowed to be readily waived. *Id.*, 631

INTEREST—See STATUTE OF LIMITATIONS, 3.

JUDGMENTS—See APPEAL AND ERROR, 14; EQUITY, 2, 3; EXECUTIONS, 2; PLEADING, 1; PRACTICE, 4; STATUTE OF LIMITATIONS, 7, 8.

JUDGMENTS. *Continued.*

1. The filing of a transcript of a Justice's judgment with the Clerk of the Circuit Court more than seven years after it was rendered, creates no lien. *Trogden v. Safford*, 240

2. Upon a bill to have the record of a judgment for costs amended, to set aside the execution issued thereon and a sale of real estate thereunder, and to cancel the certificate of purchase issued to the defendant, the purchaser, it is *held*: That the judgment complained of was never in fact pronounced by the court, the clerk having had the judgment entered against the defendants upon his understanding that the minute, "continued at costs of plaintiff," entered upon the docket by the court, was a mistake; that the clerk was without authority to substitute his recollection for the written memorandum of the court; and that the order of the court, if wrong, worked no injury to the plaintiff in the original suit, the final judgment having been against him. *Crowell v. Deen*, 863

3. Upon a bill to enjoin the enforcement of a judgment rendered by default in attachment proceedings, it is *held*: That if the special count in the declaration filed in such proceedings was bad, it will be presumed that the evidence heard *ex parte* therein justified the judgment under the common counts; that such judgments can not be attacked collaterally, even if errors and irregularities in the course of the trial were conceded; that it can not be presumed that the judgment was obtained by fraud; and that it was unnecessary in the attachment proceedings for the plaintiffs to return a worthless note, the names of the securities to which were forged, which they had previously accepted in settlement of the indebtedness. *French v. Baker*, 432

4. Under Secs. 1 and 13, Ch. 77, R. S., property on which an execution has been levied must be sold for the benefit of all executions issued upon judgments rendered at the same term, and the proceeds of such sale must be divided upon the several executions *pro rata*. *Hellman v. Schiffer*, 503

5. In the case presented, it is *held*: That the order to *pro rate* was properly based upon the balance due on appellant's judgment when the real estate was sold, after deducting the amount realized on said judgment by a previous sale of personal property; that the court properly refused to allow proof that part of the property so sold as personalty has since been taken as realty, the rule *caveat emptor* being applicable; and that certain intervening attachment liens did not cut off the last judgment from the right to *pro rate* with that of appellant. *Id.*, 503

6. A confession of judgment is sufficient to authorize the clerk to enter up the judgment if the cognovit contains the words, "I can not deny." *Lewis v. Barber*, 638

JURISDICTION—See ADMINISTRATION, 1; EQUITY, 1-3; HIGHWAYS, 2, 6; PRACTICE, 17; TRUSTS, 1.

1. The Circuit Court is without jurisdiction of an action against an assignee, claiming under an assignment for money had and received, the jurisdiction of the County Court being exclusive. *Myers v. Deering*, 58

JURISDICTION. *Continued.*

2. In all cases of concurrent jurisdiction the court which first obtains it will retain it to the end of the controversy, to the entire exclusion of others. *Mount v. Scholes*, 192

3. A suit by an administrator, on notes payable to his intestate, is not barred by a judgment rendered by a court of concurrent jurisdiction in a fraudulent suit subsequently brought by the wife of the maker in the name of the administrator for her use, she having possession of the notes. *Id.*, 192

4. A Justice of the Peace has jurisdiction of an action to recover damages for an injury to personal property. *Workman v. Neal*, 293

5. Where a will devises real estate as it would not descend under the statute, a freehold is involved. *Bice v. Hall*, 298

6. This court, for want of jurisdiction, dismisses an appeal in a case involving such a will, with leave to withdraw the record. *Id.*, 298

7. The Circuit Court has jurisdiction of a bill filed by creditors and the assignee of an insolvent to have a trust deed covering his real estate cancelled and annulled and the property passed over to the assignee. *Second Nat. Bank v. English*, 317

8. The exclusive jurisdiction of the County Court as an insolvent's court does not extend to a proceeding brought by the assignee and others to remove a cloud from the title of property claimed to be a part of the insolvent's estate. *Id.*, 317

9. Where the primary object of the suit is the recovery of a freehold estate, the title whereof is directly put in issue, and where the suit, if prosecuted to a final determination, will, by virtue of the judgment or decree rendered therein as between the parties, result in one gaining and the other losing the estate, a freehold is involved. *Moyer v. Swygart*, 498

10. Upon a bill to contest the validity of a will which devised all of a tract of land to the defendant, it is held that this court is without jurisdiction, the question at issue being whether the defendant shall have a freehold interest in all the land or only an aliquot part as an heir of the testator. *Id.*, 498

11. The judicial character of a Justice of the Peace only protects him from personal liability when the act complained of is within his jurisdiction. *Sanforth v. Classen*, 572

12. In an action of trespass against a Justice for false imprisonment. it is *held*: That the warrant, trial and fine of plaintiff for maintaining a nuisance, were regular and within the jurisdiction of the Justice; that the order of commitment, which was in the form of a commitment to bind the defendant over to the County Court, placing no limit upon the imprisonment, was irregular and not justified by the judgment; that the issue of the writ was a ministerial act; that the evidence, touching plaintiff's illness and its cause, was properly admitted under an amendment to the declaration; and that the instructions, though not strictly accurate, were sufficient. *Id.*, 572

13. It *seems* that Sec. 1, Act of April 12, 1879. does not give the Justice the option to designate the place where the offender may be

JURISDICTION. *Continued.*

imprisoned, but that said place must be fixed by city or village ordinance. *Id.*, 572

JURY—See APPEAL AND ERROR; EXEMPTIONS, 3, 4; INSTRUCTIONS.

1. Where the question is one of fact and the evidence is conflicting, it is for the jury to determine which side has the preponderance of the evidence. *Holmes v. Holmes*, 311

LANDLORD AND TENANT—See ACTIONS, 2, 3.

1. In an action on a lease against a tenant to recover damages for a breach of its covenants, the defendant may introduce, by way of recoupment under the general issue, evidence tending to show that the plaintiff had represented the roof to be in good condition, but that it was leaky and the defendant's goods were injured in consequence. *Stubblefield v. Soule*, 154

2. An unqualified conveyance of demised premises, whether by operation of law or otherwise, passes the rent thereafter to accrue. *Disselhorst v. Cadogan*, 179

3. In the case presented it is *held*: That a sale of demised premises by a special commissioner in partition proceedings, under an order merely reserving the rights of the lessee, passed the rent thereafter accruing; and that the statement in the commissioner's deed, that the purchaser was not to have possession until the termination of the lease, was unauthorized and of no effect. *Id.*, 179

4. A lease for "the whole time that he [the lessee] may be postmaster," is held to have expired with the expiration of the commission held by him at the time of its execution. *Easton v. Mitchell*, 189

5. In every estate for years the term must be certain. *Id.*, 189

6. Where the lessee holds over, the lessor may recover on a *quantum meruit*. *Id.*, 189

7. In a proceeding against the original tenant the landlord can not distrain the goods of said tenant's assignee, although they formerly belonged to the tenant and are found on the demised premises. *Howdyshell v. Gary*, 288

8. In an action of trespass to recover damages for wrongfully taking and selling the plaintiff's goods under a distress warrant against his assignor, it is *held*: That under the evidence the verdict for \$1,500 damages is excessive; that it was error to instruct the jury that the selling price of the goods at the sale under the distress warrant could not be considered as evidence of the value of the property; and that the abandonment of the lease did not entitle the landlord to recover by way of recoupment the rent to accrue, the extent of his right to recover being limited to the damages sustained. *Id.*, 288

9. In a proceeding claimed to be by distress it is *held*: That the distress warrant which authorized the bailiff to take the landlord's grain rent was an irregular and illegal way of compelling the tenant to make a division according to the lease as claimed by the landlord; that the proceedings under the warrant with the acquiescence of the defendant amount to full satisfaction of the plaintiff's claims; that the verdict for

LANDLORD AND TENANT. *Continued.*

the defendant was proper; that said verdict should not be disturbed on account of any irregularities contained in the instructions; that the plaintiff was not entitled to costs; and that the court erred in ordering a return of the property taken under the pretended distress proceedings.

Agney v. Strohecker,

525

10. Where the landlord in violation of his covenant fails to make repairs, the tenant may make them himself, charging the expense against the landlord, or sue for damages for breach of covenant.

McFarlane v. Pierson,

566

11. In an action by a tenant against the landlord to recover for work and labor performed by him on the demised premises, after an alleged eviction, it is *held*: That the failure of the landlord to furnish material for repairs did not amount to an eviction; that certain evidence touching such failure was improperly admitted; that this error was cured by subsequently excluding said evidence; that the evidence does not show such misconduct on the part of the landlord toward the servants of the tenant, nor such action touching the matter of his boarding as to amount to an eviction; and that certain instructions were erroneous, one of which is particularly objectionable because unsupported by any evidence presented. *Id.*,

566

LICENSE—See HIGHWAYS, 14; REAL PROPERTY, 1, 7.

MANDAMUS—See BRIDGES, 1; HIGHWAYS, 10.

MASTER AND SERVANT—See ADMINISTRATION, 2-8; RAILROADS, 13-15.

1. The engineer of a coal mine, whose duty it is to lower and raise the cages used in the operation of the mine, and a common laborer, whose duty it is to prepare the bottom of the shaft to receive the cages, are co-servants; and the owners of the mine are not liable for damages resulting to the latter through the negligence of the former. *Starne v. Schlothane,*

97

2. In the case presented, upon a review of the facts, this court holds that a laborer so employed can not recover for injuries sustained in the course of his employment, especially as he appears to have contributed to the negligence, if any, and although directed to continue at work by another servant of the owners. *Id.*,

97

3. In an action by a coal miner to recover damages for a personal injury caused by the falling of a rock from the roof of the defendant's mine, it is *held*: That the evidence is sufficient to sustain the verdict in favor of the plaintiff; that an instruction to the effect that if the jury believed any witness had willfully testified falsely they might disregard his testimony except in so far as corroborated by other "competent" evidence, is not specially objectionable; and that the court properly refused to give certain instructions asked by the defendant, the point therein contained being fully covered by the instructions given. *Kelley v. Wilson,*

141

MECHANIC'S LIEN.

1. Upon a petition for a mechanic's lien, a demurrer having been sustained by the court below, it is *held*: That an averment that the improvements in question were to be made upon a certain lot, although the contract refers to no particular lot or tract, is a proper averment of fact, the truth of which the demurrer admits; that the completion of said improvements dates from the making of a working test; that whether a note at nine months was paid by the giving of a new one depends upon the intention of the parties; that the contract, as existing when the performance was begun, must determine for all parties whether a lien was created, and for subsequent creditors, incumbrancers and purchasers, when the limitations prescribed in Sec. 28 began to run; and that, subject to the operation of said section in this view of the contract, no indulgence between the parties to it in respect to the time of completing the work, or of paying for it, divested the lien when once attached. *Chisholm v. Randolph*, 312

MORTGAGES—See CHATTEL MORTGAGES; STATUTE OF LIMITATIONS, 2, 5, 6; USURY, 2.

1. Upon the foreclosure of a mortgage, the allowance to the complainants of advances for the payment of taxes made after the filing of the bill, is held to have been proper under the prayer for general relief—the contingencies which would require such payment by them being set forth in the bill. *Brown v. Miner*, 60

2. Upon a bill filed to foreclose a mortgage, given to secure a note made by the guardian of a minor and payable to his successor on a promise by the latter to credit the guardianship account of the maker, and to procure an order from the County Court to that effect, it is *held*: That an answer setting up said promise, a failure of performance, and the pendency of a suit against the maker for the entire balance of said guardianship account, was pertinent; that the promise of the payee did not bind him personally or as guardian, and that the note was either without consideration, or was given upon a consideration which has wholly failed. *Deland v. Metzger*, 89

3. Where a mortgagor remains in possession after foreclosure and sale, and produces a crop, one who purchases such crop in good faith and before the appointment of a receiver, will be protected. *Knox v. Oswald*, 105

4. In the case presented it is held that the court below improperly sustained exceptions to the answer, which distinctly denies the good faith of the purchaser of the crop. *Id.*, 105

5. A mortgagee, by enforcing a decree of foreclosure by a sale of the mortgaged premises, waives any objection to the amount therein decreed to him. *Trogden v. Safford*, 240

6. Where the mortgagee purchases the homestead of the mortgagor at a sale under foreclosure, he can not apply the surplus on other claims against the mortgagor, as to which the right of homestead has not been waived. *Id.*, 240

MUNICIPAL CORPORATIONS—See APPEAL AND ERROR, 24.

1. The Mayor of a city, though not an Alderman, is a member of its Council, and as such is entitled to vote in case of a tie on the question of the passage of an ordinance. *City of Carrollton v. Clark*, 74

2. An ordinance adopted by the casting vote of the Mayor, will sustain a prosecution for a violation of its provisions. *Id.*, 74

3. In an action to recover damages alleged to have resulted from the raising of the street grade in front of plaintiff's lot, it is *held*: That the expense of filling up the lot to make it conform to the new street level can not be recovered as damages; that there can be no recovery for obstructing the flow of surface water from said lot, because damages therefor were not claimed in the declaration; and that there should have been no allowance for the appearance merely of the plaintiff's house, unless caused by the elevation of the street as distinguished from the filling up of the lot. *City of Springfield v. Griffith*, 93

4. It *seems* that in such cases there can be no recovery for depreciation by effect upon appearance merely because of changes wholly external to the premises. *Id.*, 93

5. ¶ 111, Sec. 23, Ch. 24, Starr & C. Ill. Stat., authorizing municipalities having fire departments to tax foreign insurance companies, is repealed by ¶ 32, Sec. 30, Ch. 73, such power being saved only to municipalities to which it has been expressly granted by statute. *City of Springfield v. City of London Ins. Co.*, 156

6. The duty of a municipal corporation to maintain its streets in a safe condition can not be evaded or delegated to others, and it is liable for resulting damages if it authorizes or permits the owner of an abutting lot to make excavations in front thereof. *City of Springfield v. Scheevers*, 203

7. Where a sidewalk, built and maintained by a municipality within its corporate limits, is located on the right of way of a railroad company and is necessary for the use of the public, the corporation is responsible for its condition. *Village of Mansfield v. Moore*, 326

8. Neither actual nor constructive notice is required to be shown in case of defective construction. *Id.*, 326

9. In an action against a municipal corporation for damages alleged to have resulted from a street improvement to private property, the jury should take into consideration the special benefits to the plaintiffs, distinguished from the benefits to the public in general. *Town of Genoa v. Peterson*, 457

10. To render a municipal corporation liable for personal injuries caused by slipping on snow and ice on its sidewalk, the ice and snow must have accumulated to such an extent as to cause an obstruction. Mere slipperiness and unevenness, caused by tramping, thawing and freezing, where the ice and snow has not accumulated to such an extent as to make it an obstruction, does not create a liability. *City of Aurora v. Parks*, 459

11. In an action against a municipal corporation to recover damages for a personal injury resulting from a defective sidewalk, it is *held*:

MUNICIPAL CORPORATIONS. Continued.

That there is no variance between the declaration and the evidence; that evidence as to the condition of the stringers was properly admitted under an allegation that there was, and for a long time had been, loose and broken planks and holes in, and upon and along said sidewalk; that certain instructions, making it plaintiff's absolute duty promptly to employ competent medical treatment, were properly modified; and that a verdict for \$500 for plaintiff is not excessive. *City of Elgin v. Riordan*, 600

12. Where the evidence, in an action against a municipal corporation for injuries resulting from a defective sidewalk, fails to show that the municipal authorities had notice of the defect complained of, or such circumstances as that they in the exercise of a reasonable diligence should have known of such defect, the defendant will not be liable to the person injured. *City of Joliet v. Gerber*, 622

NEGLIGENCE—See HIGHWAYS, 5; MASTER AND SERVANT, 1, 2; MUNICIPAL CORPORATIONS; RAILROADS.

1. Negligence is the want of that degree of care which the law requires in a given case. *Village of Mansfield v. Moore*, 326

2. Whether a given act is negligent or improper is to be determined by the surroundings and conditions existing at the time, and which were, or ought to have been, known to the party sought to be charged. *Chicago, B. & Q. R. R. Co. v. Owen*, 339

3. In an action to recover damages for personal and other injuries alleged to have resulted from the negligence of the defendants in excavating under a driveway leading to their warehouse, it is *held*: That the amendment to the declaration, if necessary, was merely a restatement of the same cause of action; that evidence of the plaintiff's inability to do his usual work, and of the gentleness of his horses, was properly admitted; that a verdict for \$500 in favor of the plaintiff is not excessive, and is sufficiently sustained by the evidence, although conflicting, there being no question of the gross negligence of the defendants; and that the instructions, which were numerous, were substantially correct, being especially as favorable to the defendants as they could reasonably ask. *Smith v. Toggart*, 538

NEGOTIABLE INSTRUMENTS—See APPEAL AND ERROR, 6; FORMER ADJUDICATION, 3; INSTRUCTIONS, 2; MECHANIC'S LIEN, 1, 2; PARTIES, 1; PRACTICE, 19; STATUTE OF LIMITATIONS, 2, 3.

1. In an action on a promissory note, where the only issue on the trial was whether a deed of certain premises, then occupied by the maker under a contract of purchase on account of which the note was given, was to be delivered on the delivery of the note and in consideration thereof, it is *held*: That evidence tending to show the conveyance of said premises to a third party and the dispossession of the defendant since the bringing of the action on the note, was improperly admitted; that a certain passage in the opinion of this court in reviewing the record of a former trial of the case, on the question of a waiver by the de-

NEGOTIABLE INSTRUMENTS. *Continued.*

defendant of his right to a deed on delivery of the note, is to be taken as a statement of an inference of fact based on the record then presented; and that in the opinion of this court it would still be proper for the court below to grant the defendant leave to amend his plea and to file others. *Bourland v. Gibson*, 43

2. The holder of a note, assigned before maturity as collateral security for a pre-existing debt, may recover from the maker the amount due on said debt, although the latter has paid the note to the payee. *Van-lieu v. Second Nat'l Bank*, 126

3. Where said amount is less than the amount of the note a recovery may be had *pro tanto*, although the declaration claims the amount of the note. *Id.*, 126

4. The maker is not entitled, upon the facts presented, to an allowance on account of a certain payment presumed to have been made to the holder by the payee. *Id.*, 126

5. This court refuses to disturb the finding of the court below that the note was assigned before maturity, there being ample proof to justify said finding. *Id.*, 126

6. A plea of fraud and circumvention in procuring a note, from which it appears that the surety was not deceived as to its character or amount, and in which it is alleged that certain representations as to what future circumstances might create a liability were false, is bad on demurrer. *Dennis v. Piper*, 169

7. One of two notes, made by the same principal, was given to indemnify the surety on the other note. In an action by said surety on the note payable to him, it is held that a plea to the effect that the plaintiff failed to give the statutory notice to the payee of the other note, is bad on demurrer, the defendant not having requested the plaintiff to give such notice. *Id.*, 169

8. The payment of interest already due on the note constitutes no consideration for its extension. *Id.*, 169

9. In an action on a note on the face of which certain matter appeared, it is *held*: That evidence of a failure of consideration was admissible if the holder had notice, or was fairly put upon inquiry; that this was a question for the jury; that the matter on the face of the note was admissible in connection with other facts to prove such notice; and that this court can not interfere with the verdict of the jury finding that the holder was not a *bona fide* assignee. *Smith v. Munich*, 323

10. In an action against the payee as indorser on a note transferred to plaintiff after maturity and payment, it is *held*: That the defendant is liable for the amount of the note; and that the judgment establishing the fact of payment, in a suit by the plaintiff to foreclose a trust deed securing the note, is conclusive, the defendant having been a party to the foreclosure proceedings. *Brinton v. Einhaus*, 328

11. In an action by an educational institution on notes made as subscriptions on a proposition to raise \$25,000, in sums of \$100 and upwards, the entire amount to be subscribed before any subscription should

NEGOTIABLE INSTRUMENTS. *Continued.*

become binding, said subscriptions having been made at a time when said institution was engaged in raising a similar fund in sums of \$500 and upwards, it is *held*: That the acceptance, on account of said proposition of a subscription of \$5,000, constitutes no defense, said second sum of \$25,000 having been raised without said subscription, and that parol evidence is admissible to show that the aggregate amount named in the condition of the notes has been actually obtained. *Hawes v. Illinois Wesleyan University*, 837

12. In an action on a lost note, alleged to have been made by the defendant's intestate, the only issue of fact being as to its genuineness, it is *held*: That many of the instructions, which were too numerous, were erroneous; that the holder was not required to make diligent search for the note "wherever it might be found;" that it was error to assume that the plaintiff "knowingly introduced to the jury false and fabricated testimony;" that the jury were improperly authorized to disregard the evidence of certain witnesses; that the suit was not for the original consideration; that it was for the jury to determine the weight of the evidence as to the genuineness of the note; and that it was error to instruct the jury that, in the absence of evidence as to what the consideration was, they might refuse to find the note genuine from evidence of handwriting alone. *Rose v. Vandercar*, 345

13. In an action upon a promissory note by a *bona fide* holder, the defense of want of consideration can not avail. *Kepley v. Schmidt*, 402

14. The execution of a note can only be denied by plea of *non est factum* or *non assumpsit* verified. *Bailey v. Valley Nat. Bank*, 642

15. Where the note is made by co-partners and the plea of *non assumpsit* is verified by one partner it is good only as to him. *Id.*, 642

NEW TRIAL.

1. Newly discovered evidence, which could have been procured by due diligence, or which is merely cumulative, unless decisive in character, is insufficient as ground for a new trial. *Chicago, B. & Q. R. R. Co. v. Sullivan*, 580

2. Under Sec. 56 of the Practice Act the trial court must entertain a motion for a new trial when it is duly presented in writing during the term at which judgment is entered. *Board of Education v. Hoag*, 588

3. When the defendant was not represented at the trial, a motion to set aside the judgment is addressed to the discretion of the court. *Id.*, 588

4. Newly discovered evidence which is merely cumulative is insufficient as ground for a new trial. *Classen v. Cuddigan*, 591

NOTES—See NEGOTIABLE INSTRUMENTS.

PARTIES.

1. The trustee of a military company, which has no Captain, may maintain an action in equity on a note made payable to its Captain for money borrowed of the company. *Waugh v. Andel*, 889

PARTIES. *Continued.*

2. The transfer of the note by vote of the company to the trustee, for collection, conferred upon him sufficient interest in the note to enable him to maintain suit thereon. *Id.*, 389

PARTNERSHIP—See FORMER ADJUDICATION, 3; INSTRUCTIONS, 2; INSURANCE, 6; PRACTICE, 19.

PARTY WALLS.

1. Where, before either of two adjoining owners acquired his interest, a wall was built on the line separating two lots owned by them, and it does not appear when, by whom, or on what terms it was erected, the presumption is that it belongs to such adjacent owners, each having acquired an interest in it free from any obligation to contribute to the other. *Koenig v. Haddix*, 53

2. A promise by one of such owners to the other, made under a mutual mistake as to the location of the wall, which was in fact located on the line, is void, being without consideration. *Id.*, 53

PAYMENT—See AGENCY, 1; MECHANIC'S LIEN, 1; NEGOTIABLE INSTRUMENTS, 4, 8; STATUTE OF LIMITATIONS, 3.

PERSONAL INJURIES—See ACTIONS, 1; MASTER AND SERVANT, 1, 2, 3; MUNICIPAL CORPORATIONS; RAILROADS.

PHYSICIANS.

1. In an action by a physician to recover for medical services, slight evidence of his right to practice medicine is sufficient as against one who called him. *Chicago & A. R. R. Co. v. Smith*, 202

PLEADING—See COVENANTS, 1, 2; HIGHWAYS, 2, 3; INSURANCE, 2; MECHANIC'S LIEN, 1; NEGLIGENCE, 3; NEGOTIABLE INSTRUMENTS, 6, 7, 14, 15; PRACTICE; PRIVILEGE, 2, 3; RAILROADS, 16; REAL PROPERTY, 2; SCIRE FACIAS, 1; STATUTE OF LIMITATIONS, 9.

1. Upon a *scire facias* on recognizance it is *held*: That additional pleas setting up matters admissible under the plea of *nul tiel record*, or if not so admissible, fatal as admissions of the judgment without avoiding it, were properly overruled on demurrer; that an order striking one of two indictments for the same offense from the docket was not equivalent to a discontinuance of the other, and did not release the obligors; that there is no variance, although the recognizance was not "sealed," and although the judgment of forfeiture contained surplusage; and that the judgment, although not in the best form, awarded execution against the defendants severally. *Bradley v. People*, 78

2. It is the office of a plea in abatement to set up matter which merely defeats the present proceeding, but does not bar the cause of action, and it must give the plaintiff a better writ. *Gregg v. Sumner*, 110

3. The language of a plea must be construed most strongly against the pleader. *Dennis v. Piper*, 169

4. The plaintiff in his declaration must clearly state the nature of the defendant's liability, and must clearly prove that liability as laid. *Dole v. Clow*, 477

PRACTICE—See ADMINISTRATION, 10, 12; APPEAL AND ERROR; COSTS, 2; EJECTMENT, 1; EVIDENCE, 4; EXEMPTIONS, 2-4; FORMER ADJUDICATION, 1; FRAUD, 3; INSTRUCTIONS; JUDGMENTS, 2, 3; JURISDICTION, 6, 12; MORTGAGES, 1, 4; NEGOTIABLE INSTRUMENTS, 1; PLEADING; RAILROADS, 5, 16; REAL PROPERTY, 4; REPLEVIN, 1.

1. Where the jury could not have been misled, although the instructions were somewhat inconsistent, the judgment will not be reversed on appeal. *Sells v. Sandwich Mfg. Co.*, 56

2. Where the judgment improperly includes attorney fees, this court will permit the appellee to remit the amount of such fees. *Id.*, 56

3. This court strongly condemns the conduct of counsel for plaintiff in the trial court, in the use of extremely abusive language in speaking of the defendant, much of such language referring to irrelevant matters. *Herkimer v. Shea*, 85

4. Where a judgment has been inadvertently entered for the plaintiff instead of for the defendant, an amendment may be allowed upon motion even after the expiration of the term. *Whitlock v. Stewart*, 113

5. The trial court may properly refuse to give a large number of unobjectionable instructions where the case only requires a few clear and brief ones. *Illinois Agricultural Co. v. Cranston*, 174

6. After a motion to exclude the plaintiff's evidence has been overruled in part, the defendant may be permitted to introduce evidence in defense. *Id.*, 174

7. The court below is held to have properly dismissed the cause upon a written order of the plaintiff, there being no proof to impeach the validity and good faith of the order. *Wright v. Wright*, 200

8. Where the question at issue has not been passed upon by the Supreme Court, and the authorities are conflicting, this court will adopt such rule as seems most consistent with sound reason and principle. *Brechwald v. People*, 213

9. A defendant is entitled to know from the summons where he is to appear. *Northwestern B. & M. A. Ass'n v. Woods*, 372

10. If, taking the whole writ together, he can determine where he is required to appear, it is sufficient. *Id.*, 372

11. In the case presented, it is *held*: That a writ issued from one county to the Sheriff of another is sufficiently certain, the application of the words, "said county," being made clear by considering all the parts of the writ together. *Id.*, 372

12. This court reverses a decree of foreclosure on the ground that it does not satisfactorily appear that a *remittitur*, filed by the complainant, will correct an error in the amount of the decree. *McNail v. Welch*, 378

13. While this court is not inclined to disturb the finding of the court below on the question whether there was a mistake in the amount of the note sued on, it is suggested that either party should be allowed to introduce further evidence on that issue, if desired, upon the rehearing. *Id.*, 378

PRACTICE. *Continued.*

14. The assignee of the plaintiff in an execution has an undoubted right to control such process. But an officer engaged in the service of process is not bound to regard the directions of one whose interest therein is in no way indicated by or upon such process, or otherwise brought to his attention. *Bressler v. Beach*, 422

15. Where the court has sustained an objection to the admission of documentary evidence, the error, if any, is cured by the subsequent admission of such evidence when offered by the adverse party. *Id.*, 422

16. When a judge by an order has fixed the time within which to prepare, tender and file a bill of exceptions, and the term at which it was fixed having expired and no motion for an extension of time having been made, either in vacation or at a subsequent term prior to the expiration of the time so fixed, he is without jurisdiction further to extend the time. *Dickey v. Bruce*, 445

17. In the case presented, it is *held*: That a notice of an application for an extension of time within which to file a bill of exceptions, if given as claimed, was insufficient, no time and place for making the application having been fixed, and the notice not having been in writing. *Id.*, 445

18. Instructions must be abstracted as required by the rules of this court, and if objections are to be made to them, they must be presented in the argument in chief. This court will not consider objections raised and argued for the first time in the reply brief of the appellant. *Murray v. Gibson*, 488

19. In an action on two promissory notes purporting to have been made by the defendants as copartners, and assigned and indorsed to the plaintiffs, it is *held*: That there was no error in striking a notice of set-off from the files, the declaration not having been filed prior to the filing of said notice; that no defense special to one of the defendants was allowable; that there was no error in the refusal of the court to strike the amended affidavit and bond of attachment from the files; that the attachment being against but one of the defendants, he only could assign errors in the attachment proceedings; that the court properly refused to quash the attachment writ on account of the service; that the entry of default on attachment was proper, no notice of an attachment in aid being necessary where there has been service in the original cause; that there was no variance between the declaration and the larger note and indorsements thereon; that the plea did not put in issue the indorsements; that the plea of general issue and notice sworn to did not, under Sec. 28 of the Practice Act, put in issue the execution of the note; that evidence of partial failure of consideration was inadmissible under the notice of total failure of consideration; that said evidence was properly excluded although the evidence was not all in, and that the instruction as to the burden of proof that the plaintiff was a corporation was properly refused, as an issue of *nul tiel corporation* can not be raised by notice under the statute. *Bailey v. Valley Nat'l Bank*, 642

20. Where the general issue with notice is substituted for a special plea, the defense must be proved as stated in the notice. *Id.*, 642

PRESCRIPTION—See HIGHWAYS, 1, 15.

PRINCIPAL AND AGENT—See AGENCY.

OFFICERS—See ACTIONS, 4; FRAUD, 3; HIGHWAYS; JURISDICTION, 11; QUO WARRANTO, 1; REPLEVIN, 1.

OFFICER'S RETURN—See EVIDENCE, 3.

1. Where, taking the statements in an officer's return together, it appears that process was properly served, the return is sufficient. *Brown v. Miner*, 60

PRINCIPAL AND SURETY—See APPEAL AND ERROR, 11; NEGOTIABLE INSTRUMENTS, 6, 7; SALES, 9.

PRIVILEGE.

1. Parties and witnesses while in good faith attending upon the trial of a cause in court are protected from service of legal process in civil actions, the privilege extending so long as may be fairly required in going to and returning from the place of trial. *Gregg v. Sumner*, 110

2. The question whether a party is entitled to the benefit of this privilege, may be raised by plea in abatement, although it is often presented by motion. *Id.*, 110

3. Where a statute confers a mere privilege upon a defendant, of exemption from suit except in the county where found, he will be presumed to have waived such privilege unless he especially relies upon it by way of plea. *Northwestern B. & M. A. Ass'n v. Woods*, 372

QUANTUM MERUIT—See ADMINISTRATION, 8.

QUO WARRANTO.

1. Upon a second appeal, in a proceeding in the nature of a *quo warranto* to try the title of the respondent to the office of supervisor, it is *held*: That the decision of the Supreme Court, reversing the decision of this court affirming the original judgment of ouster of the court below, is conclusive of the case as presented by the present record, the ground of said reversal being the failure of the relator to establish his election as successor to the respondent; and that it is immaterial whether the respondent was elected, there being no one else elected to succeed him.

RAILROADS.

1. The words, "on both sides of its road," as used in Sec. 3, Act of March 31, 1874, relating to fencing railroads, mean the margin or border of the entire grounds used as a roadway. *People v. Ohio & M. R. R. Co.*, 23

2. Where an adjoining owner has notified a railroad company, under said section, to fence its track, it can not construct a fence within its right of way and prevent him from connecting his fences with the fence so constructed, the incidental benefit arising to land owners being within the intention of the act, although its main object is the protection of the traveling public. *Id.*, 23

RAILROADS. *Continued.*

3. In an action to recover damages from a railroad company for killing a horse, reasonable attorney fees may be recovered for the second as well as for the first trial, although the new trial was granted by consent of counsel for plaintiff. *Indianapolis, B. & W. Ry. Co. v. Bucklis*, 181

4. In an action against a railroad company to recover damages for the killing of four horses, in which the question involved is, whether the injury was caused by the defective condition of a gate at a farm crossing, this court, upon a review of the evidence, sustains a verdict for the plaintiff. *Chicago & E. Ill. R. R. Co. v. Gernand*, 242

5. The fact that the trial court permitted the plaintiff and another witness to be recalled, after the defendant had rested, to testify as to the condition of the gate, on the Saturday before the trial, is not a sufficient ground for a reversal, the evidence not being especially harmful and the time of its introduction being within the discretion of the court. *Id.*, 242

6. Under Sec. 63, Ch. 114, Starr & C. Ill. Stat., it is the duty of a railroad corporation to keep its right of way clear from all dead grass, dry weeds and other dangerous combustible material, during the winter as well as during the summer. *Indiana, B. & W. Ry. Co. v. Nicewander*, 305

7. In an action for damages resulting from a fire set by defendant's locomotive, in January, it is held that evidence that defendant cut and burned the grass and weeds upon its right of way in September or October previous, is not sufficient to show a full compliance with the law. *Id.*, 305

8. Under the evidence presented, this court holds, that it was for the jury to say whether the defendant was guilty of negligence under said section or Sec. 104 of said chapter, and declines to interfere with their verdict. *Id.*, 305

9. The statutory duty of a railroad company to maintain suitable and sufficient cattle guards to prevent stock from getting on its track is not complied with when, for an unreasonable time, it permits its guards to remain filled up with snow, ice or any other substance which destroys their usefulness. *Indiana, B. & W. Ry. Co. v. Drum*, 331

10. In the case presented it is held: That an instruction touching the liability of the defendant for permitting snow and ice to remain in the cattle guard fairly presented the law to the jury, and that the question whether a reasonable time had elapsed for the removal of the snow and ice, was for the jury. *Id.*, 331

11. In an action to recover damages for the loss of a colt, alleged to have been killed through the negligence of the servants of the defendant company, it is held: That the questions of negligence were fairly submitted to the jury; that certain instructions asked were properly refused, because they presented the old rule of contributory negligence and permitted no comparison; and that the verdict is supported by the evidence. *Chicago & E. Ill. R. R. Co. v. Boggess*, 336

RAILROADS. Continued.

12. In an action against the appellant, as a common carrier, to recover damages for injuries to a calf alleged to have been sustained while in transportation through the negligence of the defendant's servants, it is *held*: That the verdict in favor of the plaintiff is not supported by the evidence; that the calf was properly unloaded at the depot instead of at the stock pen; that from the evidence presented, the injury resulted from the calf's vicious disposition unprovoked by any misconduct by the defendant or its servants; and that an instruction limiting the exceptions to the defendant's liability to the act of God and the public enemy, was erroneous. *C., B. & Q. R. R. Co. v. Owen*, 339

13. Railroad companies are by the law held to a high degree of care and diligence in the adoption and enforcement of all needful rules and regulations to avoid collisions of trains, and thereby promote the safety of their employes and others. *Chicago & A. R. R. Co. v. McDonald*.

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14. The conductor and engineer of a construction train and a shoveler employed on such train are fellow servants engaged in the same branch of service, and their common master is not liable for an injury to the shoveler through the negligence of the conductor and engineer, or either of them. *Id.*,

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15. In the case presented, it is *held*: That the collision causing the injury complained of was due to the negligence of the conductor, superinduced by the inexcusable carelessness or wilfulness of the engineer; and that, under all the circumstances, it was not reasonably necessary to prevent the collision for the train dispatcher to notify the conductor of the construction train that the regular passenger train was late, it being the duty of the latter, under his working orders and the general rules, to wait until the passenger train had passed. *Id.*,

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16. In an action to recover damages for personal injuries suffered by the plaintiff in a collision while a passenger on the road of the defendant company, it is *held*: That there was no variance between the declaration and the testimony; that proof of the breaking down of the plaintiff's nervous system and that his nerve trouble might result in death, was properly admitted; that the rules of pleading did not require the plaintiff to set out in his declaration the evidence relied upon; that the evidence sustains the verdict for the plaintiff; that this court will not interfere with the verdict; the credibility of the witnesses and weight of the evidence being questions for the jury; that the verdict for \$5,000 is not excessive; that the court below properly refused to grant a new trial on the ground of newly discovered evidence. *Chicago, B. & Q. R. R. Co. v. Sullivan*,

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RATIFICATION—See **FRAUD**, 5.

REAL PROPERTY—See **ACTIONS**, 2, 3; **AGENCY**, 1; **FRAUDULENT CONVEYANCES**, 1; **HIGHWAYS**, 13; **HUSBAND AND WIFE**, 1, 2; **LANDLORD AND TENANT**, 5.

1. A parol license to enter upon or pass over the land of another is revocable at the pleasure of the licensor, and may be revoked by the

REAL PROPERTY. *Continued.*

appropriation of the land to any use inconsistent with the enjoyment of the license. *Simpson v. Wright*, 67

2. Under the rule that the averments of a bill, when equivocal, must be taken most strongly against the complainant, it must be presumed that the "contract" and the "mutual consent" referred to were merely verbal, and that the occupant had no title to the land or authority to impose upon it the burden of the easement claimed. *Id.*, 67

3. Such contract and consent, though in parol, were neither void nor voidable under the Statute of Frauds. They amounted merely to a license, which the bill itself shows to have been revoked. *Id.*, 67

4. In an action to recover damages for overflowing plaintiff's land, it is *held*: That, although the evidence is conflicting, the proof sustains the declaration that the questions involved were for the jury, and that the instructions given for the plaintiff properly submitted the controverted questions to the jury. *Dole v. Clow*, 477

5. The owner of a dominant estate can not by any act of his own acquire the right to collect the surface water upon his land by artificial channels and thus flood his neighbor's land without his consent or at least acquiescence. *Stoddard v. Filgur*, 560

6. When a person makes an artificial ditch upon his own land for his own accommodation, he is not obliged to keep it open as an artificial drain for the purpose of draining the lands of others. *Id.*, 560

7. A parol license to turn water, which has been artificially collected into a ditch upon the land of another, is valid and revocable. *Id.*, 560

8. In the case presented, it is held that the owner of the dominant estate is not entitled to an injunction to prevent the filling up of an open ditch on the servient estate. *Id.*; 560

RECOUPMENT—See LANDLORD AND TENANT, 1, 8.

REPLEVIN—See SALES, 9, 12; STATUTE OF LIMITATIONS, 4; CHATTEL MORTGAGES, 8.

1. Where the defendant, in an action of replevin, defends on the ground that he was constable and took the property in question by virtue of an execution, and the direct question of his official character is raised, he must show that he was a constable *de jure*. Evidence that he was an acting constable is inadmissible. *Vaughn v. Owens*, 249

2. In an action of replevin, brought by the purchaser of the goods in question at a sale under chattel mortgage, against a subsequent creditor of the mortgagor who had levied on the goods, claiming the delivery was insufficient, it is *held*: That the question being a close one, this court will not interfere with the judgment of the court below. *Steere v. Brownell*, 302

3. In replevin the issue is upon the right of possession at commencement of the suit. *Ator v. Rix*, 309

4. Although, under the statute, the court will not deprive the plaintiff of actual possession where he has, since the commencement of the suit, acquired a right to it, there is no rule by which he may have judgment for a return upon the strength of an after-acquired lien. *Id.*, 309

REPLEVIN. *Continued.*

5. In an act on of replevin against a Sheriff to recover property held by him under certain executions, it is *held*: That the possession of the son of the plaintiff was fraudulent as to creditors, and that the plaintiff is estopped from setting up a claim thereto. *Lewis v. Barber*, 638

ROADS—See HIGHWAYS.

SALES—See BROKERS, 1, 2; CHATTEL MORTGAGES, 1, 2, 5, 7; FRAUD, 3; JUDGMENTS, 4, 5.

1. An absolute sale of personal property which is capable of removal, but which is not removed from the possession of the vendor, is fraudulent as against creditors and subsequent purchasers, although made in good faith and for an adequate consideration. *Harts v. Jones*, 150

2. This rule is held to apply to a lot of corn plows separated from the vendor's stock, and also to another lot so separated and placed in a separate building rented for the purpose, but remaining under his control. *Id.*, 150

3. As a general rule, a delivery to a common carrier is held to be a delivery to the consignee. *Brechwald v. People*, 213

4. Where liquor is sent by express by a dealer in one county to a purchaser residing in another, the dealer can not be prosecuted in the latter county for illegally selling liquor therein. *Id.*, 213

5. In an action to recover damages for breach of contract for the sale of cattle, it is *held*: That proof of prices was properly limited by the court below to the period between the demand by plaintiff and the sale of the cattle to other parties by the defendant; that an instruction to the effect that the measure of damages is the difference between the contract price and what the cattle were worth at the time and place when and where they were to be delivered under the contract, was proper, in view of the evidence presented; and that another instruction is not open to certain objections depending on the evidence. *Fletcher v. Patton*, 228

6. Upon a sale of a growing crop the title and possession pass to the vendee. *Vaughn v. Owens*, 249

7. The purchaser of a growing crop of corn, where the quantity is considerable, may have it cribbed on the premises where grown, without subjecting it to levy for the debts of the vendor. *Id.*, 249

8. In the case presented, it is *held*: That the evidence shows a complete sale of the corn in question while growing, although it was to be gathered and cribbed by the vendor and the quantity was then to be ascertained or agreed upon by the parties. *Id.*, 249

9. In an action of replevin, brought by certain creditors of the original owner of goods claimed by them as purchasers from the agent of said owner, against an officer who holds under writs of attachment sued out by other creditors of said owner, it is *held*: That the agent was authorized to make any disposition of the property which his principal might have made; that the principal, though in failing circumstances, might in good faith have preferred particular creditors, and made a sale to them in consideration of claims; that he might have given pref-

SALES. *Continued.*

erence to his sureties upon their obligations ; that said sureties had the right to secure payment of their obligations in preference to other creditors ; that the contract of sale made by the agent was subject only to the contingency of other creditors successfully contesting it ; that the evidence does not show said transaction to have been fraudulent or entered into with the intent to hinder and delay creditors, and that there was no error in giving or refusing instructions. *Wood v. Clark*, 464

10. An absolute sale of personal property, where the possession is permitted to remain with the vendor, is fraudulent *per se* and void as to creditors and purchasers. *Wood v. Leemis*, 604

11. To constitute a change of possession there must not only be a delivery to the vendee but a continuing possession by him. *Id.*, 604

12. In an action of replevin by the vendee of personal property against an officer who holds under a levy upon execution against the vendor, it is *held*: That there was no substantial change in possession, and that the circumstances indicate fraud in fact and in law. *Id.*, 604

13. In an action to recover the value of lumber alleged to have been sold to the defendant and delivered through the contractor, who was building him a house, it is *held*: That an instruction to the effect that the acceptance and presentation by the plaintiff of an order by the contractor on the defendant was *prima facie* evidence that the contractor and not the defendant was originally liable, was erroneous, being in effect in view of the evidence an instruction to disregard the evidence of the plaintiff and find for the defendant ; that an instruction to give the plaintiff's evidence in regard to oral statements of the defendant special scrutiny, was erroneous ; that an instruction not applicable to any evidence in the case should not have been given ; and that if evidence to show that the defendant had paid the full contract price of the house to other parties was improperly admitted, the error can be corrected on a new trial. *Byrne v. Hartshorn*, 650

SCIRE FACIAS—See PLEADING, 1.

1. Upon *scire facias* to make a third person a party to a judgment, rendered upon a former judgment of the same court against him and the defendant in the last judgment, it is *held*: That every good defense must be a defense against the former judgment and not against the note or account on which it was founded, that the defenses, *non assumpsit*, *non est factum* and *nil debet*, were irrelevant, even if the plea setting them up was not bad for duplicity ; and that a rejoinder to a replication averring that the record of the judgment and return showed personal service, which avers that said return is false, is insufficient at law. *Harrison v. Hart*, 348

SETTLEMENT—See FRAUD, 2.

STATUTE OF FRAUDS—See REAL PROPERTY, 3.

1. A rescission of an executory contract for the sale of lands is within the Statute of Frauds, and requires the same evidence to establish it as is required to establish a sale. *Catlett v. Dougherty*, 116

STATUTE OF FRAUDS. *Continued.*

2. A transfer or re-sale of lands to the original owner by one in possession thereof under the contract of purchase is within the Statute of Frauds, and requires some evidence in writing to sustain an action for the consideration. *Id.*, 116

3. In the case presented the attempted transfer was an intended re-sale and not a rescission of the original contract, said transfer being of a less interest than that covered by said contract. *Id.*, 116

STATUTE OF LIMITATIONS—See FRAUD, 4.

1. Statutes of limitation are not given a retroactive effect, except upon a clear expression of the legislative will. *Blackburn University v. Weer*, 29

2. The Act of 1872, limiting the time for the foreclosure of mortgages, does not apply to a mortgage previously given to secure the payment of a promissory note. *Id.*, 29

3. Upon a conveyance made in 1866, of certain lots in Carlinville, the deed reserved a lien to secure a note given for part of the purchase money. In each of several subsequent conveyances of said lots, the last made December 25, 1872, the lien was expressly retained, each grantee assuming and agreeing to pay the note. The interest was paid to the legal holder, a purchaser before maturity by various of the grantees, the last grantee paying it from December 25, 1872, to January 26, 1883. Subsequently the last of said grantees conveyed the lots by mortgage and quitclaim deed. Upon a bill, filed February 5, 1885, to enforce the lien securing said note, *held*: That the note held by complainant is the original note, a difference of date being a mistake; that the bill is not barred by the Act of 1872, limiting the time for the foreclosure of mortgages; that, in the absence of proof to the contrary, the payments of interest by the grantee of the maker, are to be taken, as against the holder of the note, as payments by the maker through him as his agent; that said payments arrested the running of the limitation of sixteen years against the note; that those holding under said last mortgage and said quitclaim deed, with notice of said first mortgage, are bound by said payments of interest as new promises which arrested the running of the statute against the mortgage debt; and that the right to file this bill was among the "rights and liabilities" saved by Sec. 24 of the Act of 1872. *Id.*, 29

4. Replevin brought to recover a horse ten years after it was irregularly sold as an estray is barred by the Statute of Limitations, the cause of action having arisen at the time of the unlawful conversion of the horse. *Carr v. Barnett*, 137

5. Sec. 11 of the Limitation Act of 1872, being prospective only in its operation, does not apply to a trust deed executed and delivered prior to July 1, 1872, when that act took effect. *Jones v. Lander*. 510

6. It is the settled law of this State that mortgages and trust deeds are within the Statute of Limitations, and are barred thereby at the same time as the debts which they secure. *Id.*, 510

7. A Justice's judgment is not within Sec. 15, Chap. 83, Starr & C.

STATUTE OF LIMITATIONS. *Continued.*

Ill. Stat., which limits the time within which to bring certain actions to five years. *Aarvig v. Kellogg*, 530

8. Such a judgment is included within the words: "Other evidences of indebtedness in writing," found in Sec. 16, which limits the time within which to bring the actions therein included to ten years. *Id.*, 530

9. While a new cause of action can not be injected into a pending litigation by amendments or additional counts to the declaration, so as to avoid the plea of the Statute of Limitations, if the amendment or additional count is a mere restatement of the original cause of action, the bar of the statute will not apply. *Smith v. Taggart*, 538

STATUTES—See ACTIONS, 6-8; ADMINISTRATION, 9, 11; BRIDGES, 1; HIGHWAYS, 9, 11, 16; MUNICIPAL CORPORATIONS, 5; RAILROADS, 1.

1. In the construction of a statute its language should be given, when the sense will bear it, its usual and popular meaning. *People v. Ohio & M. R. R. Co.*, 23

2. Statutes must be interpreted according to their intent and meaning, and not always according to their letter. When the words are not precise, definite and clear such construction will be adopted as shall appear most reasonable and best suited to accomplish the general object of the statute. Where any particular construction would lead to an absurd consequence, it will be presumed that some qualification or exception was intended. *People v. Blackwelder*, 254

SUMMONS—See PRACTICE, 9, 11.

SURETY—See PRINCIPAL AND SURETY.

SURVIVORSHIP—See ACTIONS, 1.

TRESPASS.

1. In an action of trespass to recover damages for flooding plaintiff's land by means of a defective tile drain, it is *held*: That the appellants are not shown by the evidence to have been privy to the act of extending a certain drain made by them, said extension which caused the injury complained of having been made by the other defendant; and that the appellants had a right to assume that the other defendant would carry out his offer to take care of the water from their drain in a proper manner and are not liable for his failure so to do. *Davidson v. Sprague*, 611

TRUST DEEDS—See AGENCY, 1; FRAUD, 5; NEGOTIABLE INSTRUMENTS, 10.

1. The holder of notes secured by a trust deed may be the trustee therein. *Foster v. Latham*, 165

TRUSTS.

1. A court of equity will not exercise its power to take charge of a trust and administer it when it appears that it is being properly administered. *Meyers v. Trustees of Schools*, 223

TRUSTS. *Continued.*

2. In the case presented, it is *held*, that the proceeds of a bequest to a certain school district "to be added to the principal of the school fund" thereof, are properly in the hands of the township trustees; and that the fact that the voters of said district do not constitute a majority of the voters of the township is not a sufficient ground for the appointment of special trustees. *Id.*, 223

TRIAL—See APPEAL AND ERROR; NEW TRIAL; PRACTICE.

USURY.

1. It is a well established rule in this State that brokers, in negotiating loans of the money of others, may charge the borrower commissions without thereby making a loan, at the full rate of legal interest, usurious. *Haldeman v. Mass. Mut. Ins. Co.*, 146
2. Upon the foreclosure of a mortgage the decree may include a solicitor's fee if the mortgage so provides. *Id.*, 146
3. Usury is not to be presumed but must be pleaded and established unless upon the face of the contract it is apparent. *Farmers' and M. Nat. Bank v. Barton*, 403
4. A stipulation contained in a note for attorney's fees where suit is brought, upon default in payment, is not usurious upon its face. *Id.*, 403
5. Such a stipulation being a contract for indemnity only, it seems that the plaintiff can recover only a reasonable compensation for the services of his attorney, not in excess of the limit of the stipulation. *Id.*, 403

WIDOW'S AWARD—See ADMINISTRATION, 9-12.

1. In making their estimate of the widow's award, under Secs. 74 and 75, Ch. 3. R. S., the appraisers are required to appraise the articles actually possessed by the estate, which are within the description of Sec. 74. *Rutledge v. Rutledge*, 357
2. The appraisers are not required to estimate the value of the family pictures and wearing apparel, jewels and ornaments of the widow and her minor children, all of which are included in the award without reference to their value. *Id.*, 357
3. If the estate has the specific articles which fairly and substantially answer the designation of the statute, they or their value as fixed by the appraisers must be taken. *Id.*, 357
4. It seems that if the specific articles possessed by the estate are so worthless as to be unfit for ordinary use, or if they have an unusual value for some special use, the appraisers should disregard and ignore them. *Id.*, 357

WILLS—See JURISDICTION, 6, 10.

1. The words "equally divided among my heirs," when used in a will, unless a different intention appears from the context, mean an equal division of the testator's estate *per capita*. *Best v. Harris*, 49

WITNESSES—See EVIDENCE, 6; INSTRUCTIONS, 2,

Ex. 1. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100. 101. 102. 103. 104. 105. 106. 107. 108. 109. 110. 111. 112. 113. 114. 115. 116. 117. 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 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1354. 1355. 1356. 1357. 1358. 1359. 1360. 1361. 1362. 1363. 1364. 1365. 1366. 1367. 1368. 1369. 1370. 1371. 1372. 1373. 1374. 1375. 1376. 1377. 1378. 1379. 1380. 1381. 1382. 1383. 1384. 1385. 1386. 1387. 1388. 1389. 1390. 1391. 1392. 1393. 1394. 1395. 1396. 1397. 1398. 1399. 1400. 1401. 1402. 1403. 1404. 1405. 1406. 1407. 1408. 1409. 1410. 1411. 1412. 1413. 1414. 1415. 1416. 1417. 1418. 1419. 1420. 1421. 1422. 1423. 1424. 1425. 1426. 1427. 1428. 1429. 1430. 1431. 1432. 1433. 1434. 1435. 1436. 1437. 1438. 1439. 1440. 1441. 1442. 1443. 1444. 1445. 1446. 1447. 1448. 1449. 1450. 1451. 1452. 1453. 1454. 1455. 1456. 1457. 1458. 1459. 1460. 1461. 1462. 1463. 1464. 1465. 1466. 1467. 1468. 1469. 1470. 1471. 1472. 1473. 1474. 1475. 1476. 1477. 1478. 1479. 1480. 1481. 1482. 1483. 1484. 1485. 1486. 1487. 1488. 1489. 1490. 1491. 1492. 1493. 1494. 1495. 1496. 1497. 1498. 1499. 1500. 1501. 1502. 1503. 1504. 1505. 1506. 1507. 1508. 1509. 1510. 1511. 1512. 1513. 1514. 1515. 1516. 1517. 1518. 1519. 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